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Volume 21 No. 2 1988

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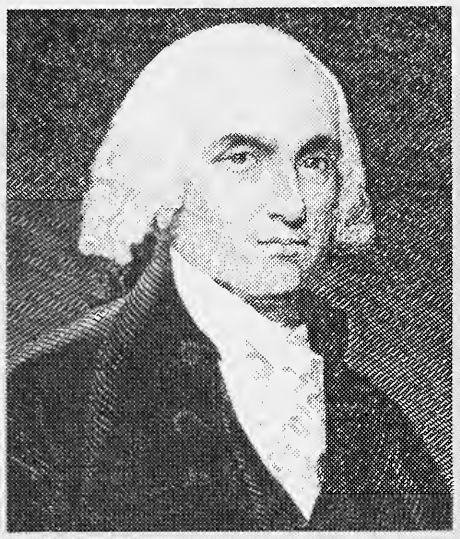

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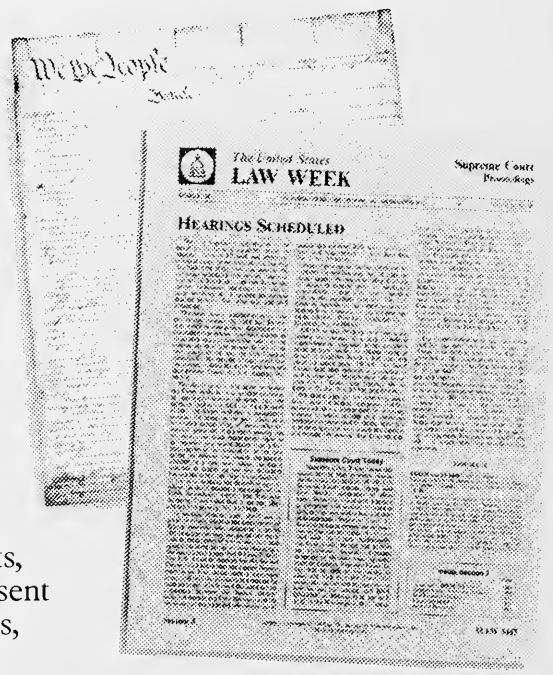

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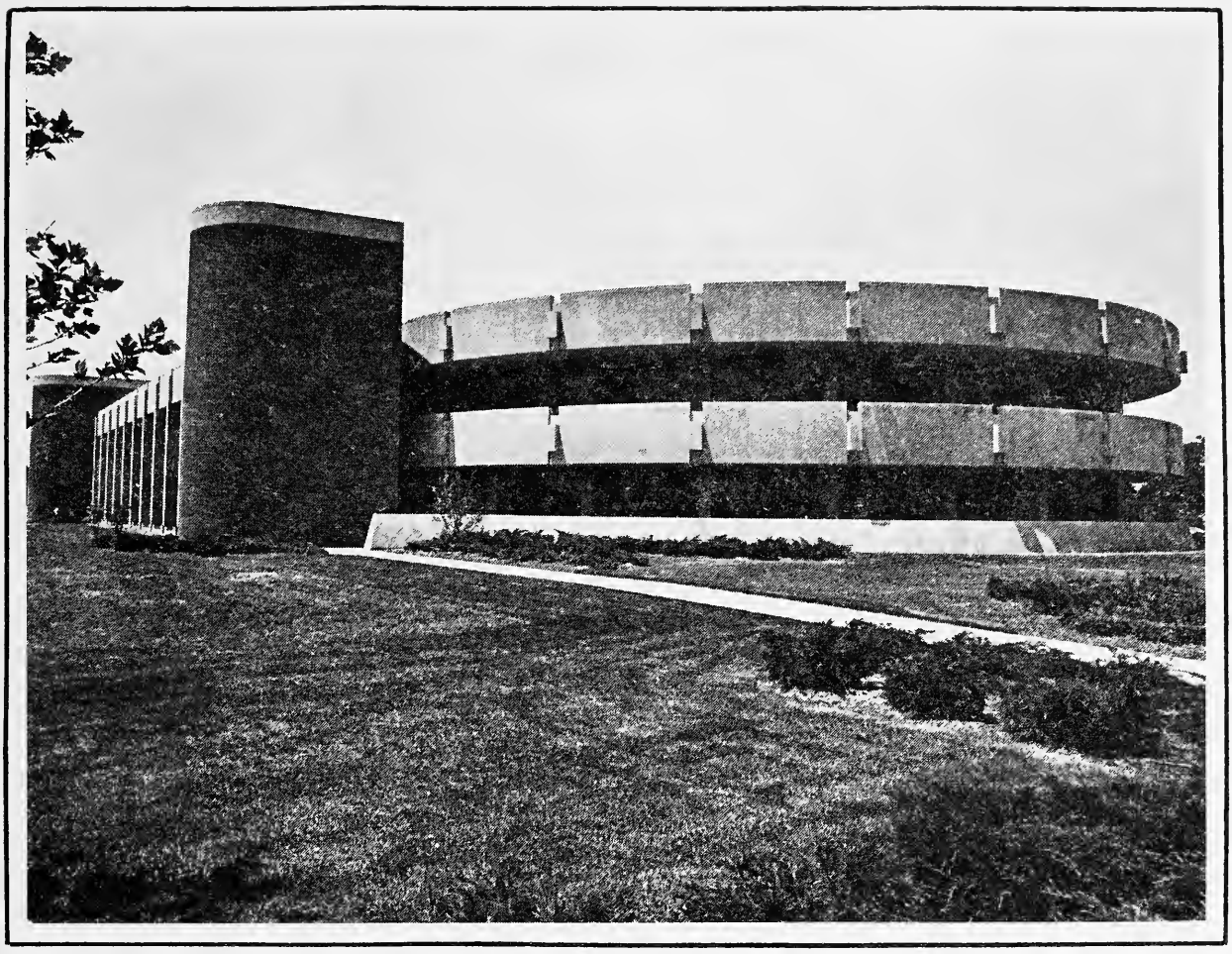

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The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibilty thereof. Subscription rates: one year $22; foreign $25. Please notify us one month in advance of any change in address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 West New York Street, Indianapolis, Indiana 46202.

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Volume 21 1988

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Toward True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital

Bruce A. Markell*

I. Introduction

Fraudulent transfer law[1] is in the midst of a renewal and a revival. Ten years ago Congress rewrote the Bankruptcy Code section related to

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[1]There are at least five sources of fraudulent transfer law. The basic text for the last seventy years has been the Uniform Fraudulent Conveyance Act (UFCA), promulgated in 1918 by the National Conference of Commissioners on Uniform State Laws (National Conference). The UFCA is reprinted at 7A U.L.A. 427 (1985). The National Conference promulgated a new uniform act in 1984, calling it the Uniform Fraudulent Transfer Act (UFTA). It is reprinted at 7A U.L.A. 639 (1985). The third source is section 548 of the Bankruptcy Code (Code). The Code is codified at 11 U.S.C. §§ 101 *et seq.* (1982). The fourth source, relevant primarily in the interpretation of older cases, is section 67d of the now-repealed Bankruptcy Act of 1898 (Act). Like the Code, the Act contained its own section covering fraudulent transfers, which, for the most part, mirrored the UFCA. Act § 67d, 11 U.S.C. § 107d (1976) (repealed 1979). *See infra* note 103. Finally, fraudulent conveyance law was part of the common law received from England, and almost every state either adopted it through decisional law, or codified its own version by statute. *See, e.g.*, Molitor v. Molitor, 184 Conn. 530, 535, 440 A.2d 215, 218 (1981) (finding that the UFCA "is largely an adoption and clarification of the standards of the common law"); Tex. Bus. & Com. Code Ann. § 24.02 (Vernon 1968) (repealed 1987).

An excellent and detailed account of the common law history of fraudulent conveyances can be found in 1 G. Glenn, Fraudulent Conveyances and Preferences §§ 58-62b (Rev. ed. 1940). An equally excellent analytical account of the policy goals served by fraudulent transfer law can be found in Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 Harv. L. Rev. 505 (1977).

such transfers,[2] and four years ago the National Conference of Commissioners on Uniform State Laws promulgated a new uniform act for state adoption.[3] During this period, both state and federal courts have invalidated, in the name of such fraudulent transfer laws, a broad range of transactions, including mortgage foreclosures[4] and leveraged buyouts.[5] These cases have been controversial;[6] indeed, many have been the animus for new legislation.[7]

The focus of this concern has been "constructively" fraudulent transfers. This branch of fraudulent transfer law scrutinizes transactions in which a person transfers property or incurs an obligation[8] without

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[2]11 U.S.C. § 548 (1982), *adopted* as part of Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The Code's effective date was October 1, 1979. *Id.* § 402.

[3]Uniform Fraudulent Transfer Act, *supra* note 1.

[4]*See, e.g.*, Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 203 (5th Cir. 1980). *Durrett* unleashed a mammoth amount of academic writing and case law. A partial collection can be found in McCoid, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 TEXAS L. REV. 639, 639 nn.1-8 (1983).

[5]*See, e.g.*, United States v. Gleneagles Investment Co., Inc., 565 F. Supp. 556 (M.D. Pa. 1983), *aff'd sub nom.*, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), *cert. denied sub nom. McClellan Realty Co. v. United States*, 107 S. Ct. 3229 (1987); Kaiser Steel Corp. v. Jacobs (*In re* Kaiser Steel Corp.), 17 Bankr. Ct. Dec. (CRR) 911 (Bankr. D. Colo. 1988) (allowing fraudulent conveyance attack on $140,000,000 leveraged buyout to proceed). *See generally* Note, *Fraudulent Conveyance Law and Leveraged Buyouts*, 87 COLUM. L. REV. 1491 (1987); *see also infra* note 152.

[6]With respect to mortgage foreclosures, see Alden, Gross & Borowitz, *Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the* Durrett *Problem*, 38 BUS. LAW. 1605, 1613 n.22 (1983); Zinman, Houle & Weiss, *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 BUS. LAW. 977, 979 (1984). With respect to leveraged buyouts, see Kupetz v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 77 Bankr. 754, 759-60 (C.D. Cal. 1987) (questioning applicability of fraudulent transfer laws to leveraged buyouts), *aff'd sub. nom.* Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988); Baird & Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 850-54 (1985).

[7]The foment caused by *Durrett* and the various legislative reactions are reviewed in Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C.L.J. 195, 206-08 (1986). *See also* 130 CONG. REC. S7617 (daily ed. June 19, 1984) (amendment effectively overruling *Durrett*, deleted due to lack of ability to debate merits); CAL. CIV. CODE § 3439.08(e)(2) (West Supp. 1988) (transfer not voidable if it results from "[e]nforcement of lien in a non-collusive manner and in compliance with applicable law . . . ."); Comment (5) to Proposed Section 3439.08 of the CAL. CIV. CODE, *Report of Assembly Comm. on Fin. and Ins. on S.B. 2150, reprinted in* CAL. ASSEMBLY J. 8569, 8568 (July 8, 1986) [hereinafter CAL. ASSEMBLY J.] (explicitly rejecting *Durrett*).

[8]The original target of fraudulent conveyance laws was transfers of tangible property to avoid execution, levy and seizure by the transferor's creditors. *See* G. GLENN, *supra* note 1; Baird & Jackson, *supra* note 6. The common law later came to the view that a creditor's incurrence of certain obligations could also offend, in that they would force a debtor's legitimate creditors to share distributions with individuals whose claims might be suspect. Accordingly, the UFCA enabled creditors to set aside not only conveyances, but also obligations, if they were not exchanged for a fair consideration and made while the transferor or obligor was in a condition of financial stringency. UFCA §§ 3, 4 & 6.

receiving a corresponding and reasonably equivalent benefit, such as in gifts[9] or accommodation guaranties.[10] If the transferor is also left in a specified and defined condition of financial stringency, a "constructively" fraudulent transfer exists.

Creditors of the transferor can, among other things, seek to set aside the "constructively" fraudulent transfer, without regard to the state of mind or intent of the parties.[11] In short, the "fraudulent" transfer need not be made with any intent to defraud; indeed, it can even have been made with the purest of motives. Nevertheless, as long as it depletes the transferor's assets and leaves the transferor with what the law deems insufficient remaining assets, the transfer may be set aside.

Constructively fraudulent transfers exist if two conditions are present. The first is the transferor's failure to receive fair consideration or

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Section 5 of the UFCA, *supra* note 1, which covers conveyances which leave the transferor with unreasonably small capital, however, only extends to conveyances. Obligations are not within its scope. UFCA § 5. The Code and the UFTA, have eliminated this distinction. 11 U.S.C. § 548(a)(2)(B)(ii) (1982); UFTA, *supra* note 1, § 4(b)(i).

[9]*See* Hyman v. Porter (*In re* Porter), 37 Bankr. 56 (E.D. Va. 1984); Reade v. Livingston, 3 Johns. Ch. 481 (N.Y. Ch. 1818).

[10]Although the issue was "left to case law" under the Code, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, 93d Cong., 1st Sess., Part II, at 177 (1973) [hereinafter COMMISSION REPORT], current cases have found accommodation guaranties to be lacking in reasonably equivalent value as required by section 548(a)(2)(A). Consove v. Cohen (*In re* Roco Corp.), 701 F.2d 978 (1st Cir. 1983); Whitlock v. Max Goodman & Sons Realty, Inc. (*In re* Goodman Indus., Inc.), 21 Bankr. 512 (D. Mass. 1982). *See also* Chase Manhattan Bank v. Oppenheim, 109 Misc. 2d 649, 440 N.Y.S.2d 829 (N.Y. Sup. Ct. 1981) (applying New York version of UFCA). *But cf. In re* Xonics Photochemical, Inc., 841 F.2d 198 (7th Cir. 1988) (suggesting that affiliate may derivatively obtain sufficient value from intercorporate guaranty).

[11]Under the UFCA, a creditor holding a "matured" claim has the following options with respect to remedies: it can seek to set aside, to the extent necessary to satisfy the creditor's claim, the transaction deemed fraudulent, or it may ignore the conveyance and seek to levy upon the property in the hands of the transferee. UFCA, *supra* note 1, § 9. By contrast, holders of "unmatured" claims may also seek to set aside the claim, but may not levy execution. Instead, they are given equitable remedies to enjoin further disposition of the property fraudulently conveyed. *Id.* § 10. One major advance of the UFCA over the common law was that it eliminated the necessity for a creditor to reduce its claim to judgment, or to have its execution returned unsatisfied, as a predicate for maintaining an action. *See also* American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929).

Remedies under the UFTA are similar, except that the UFTA eliminates distinctions between matured and unmatured claims. UFTA, *supra* note 1, § 7. In addition, the UFTA offers an option of adding the provisional remedy of attachment. *See* Prefatory Note to UFTA, 7A U.L.A. 639 (1985).

The Code allows the bankruptcy trustee or debtor in possession to "avoid" the transfer. 11 U.S.C. § 548(a) (1982). This, in turn, permits the entity avoiding the transfer to "recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property . . . ." 11 U.S.C. § 550(a) (1982).

reasonably equivalent value in exchange for the transfer or the obligation.[12] The second is the presence of a predefined adverse financial condition, either before the questioned transaction or because of it;[13] in short, the law requires debtors to be just before they are generous.[14] In this regard, the classic type of precarious financial condition has been balance sheet insolvency, and most constructively fraudulent transfer cases explore this concept.[15]

The common law and its statutory codifications, however, recognize at least one other adverse financial condition. Under all forms of fraudulent transfer laws, a voluntary transfer or one for inadequate consideration will be set aside if it leaves the transferor with "unreasonably small capital."[16] Although not the subject of a vast body of case law,[17] the origins of this type of fraudulent transfer run deep, and the recent legislative reformations may have increased its potential as a creditor's remedy.

This article reviews the origins of the unreasonably small capital branch of fraudulent transfer law. It then traces its development and its various formulations under the Uniform Fraudulent Conveyance Act (UFCA) and the Bankruptcy Act of 1898 (Act). After reviewing recent cases and the changes made by the Bankruptcy Code of 1978 (Code) and the new Uniform Fraudulent Transfer Act (UFTA), it then criticizes two lines of cases which are contrary to the action's historical antecedents and the goals of modern fraudulent transfer law. It concludes by suggesting unifying themes linking the historical origins of the action with current case law.

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[12]11 U.S.C. § 548(a)(1) (1982); UFCA, *supra* note 1, §§ 4-6; UFTA, *supra* note 1, § 4(a)(1).

[13]These conditions are: insolvency, 11 U.S.C. § 548(a)(2)(B)(i); UFCA, *supra* note 1, § 4; UFTA, *supra* note 1, § 5; a knowing incurrence by the transferor of debts beyond the transferor's ability to repay them, 11 U.S.C. § 548(a)(2)(B)(iii); UFCA, *supra* note 1, § 6; UFTA, *supra* note 1, § 4(a)(2)(ii); and the topic of this article, unreasonably small capital or assets, 11 U.S.C. § 548(a)(2)(B)(ii); UFCA, *supra* note 1, § 5; UFTA, *supra* note 1, § 4(a)(2)(i).

[14]*See* Claflin v. Mess, 30 N.J. Eq. 211, 212, (1878); Black v. Sanders, 46 N.C. (1 Jones) 67, 68 (1854).

[15]The Uniform Laws Annotated requires 29 pages to list the annotations for constructively fraudulent transfers involving insolvency. 7A U.L.A. 479-504, nn.9-91 (1985) & 78-9, nn.10-91 (Supp. 1988).

[16]The UFTA changes this formulation to "unreasonably small *assets*." UFTA, *supra* note 1, § 4(a)(2)(i). The change was meant to "focus attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage." UFTA, *supra* note 1, § 4, comment 4.

[17]While the casenote annotations for the insolvency section of the UFCA cover 29 pages, *see supra* note 15, the annotations for the unreasonably small capital section take up barely five pages. 7A U.L.A. 504-507 (1985) & 80 (Supp. 1988).

II. A Brief History of Fraudulent Conveyance Laws

A. Common Law Origins

American fraudulent transfer laws date from the Statute of Elizabeth, enacted in 1571.[18] Designed as a penal statute, with the English crown receiving as its penalty fully one-half of all property recovered,[19] it prohibited conveyances made with the "intent to delay, hinder or defraud creditors and others of their just and lawful actions."[20] The statute saw such conveyances as contributing to "the overthrow of all true and plain dealing . . . without which no commonwealth or civil society can be maintained or continued."[21]

Defrauded creditors soon turned this penal statute to their personal ends. Since such transfers were illegal, and thus presumable void, creditors reasoned that they could ignore the conveyance and follow the transferred property into the hands of the party receiving the goods.[22] In short, passage of title was ignored, and the party receiving the goods had to give them up if the debt was just.[23] Courts adopted this reasoning,[24] and in 1603 Parliament followed suit and made fraudulent conveyances a part of the English bankruptcy laws.[25] In 1623 Parliament completed the process and made these laws civil in nature.[26]

The exact language of the statute, however, seemed to require proof of "actual" fraudulent intent. Yet one who fraudulently transfers prop-

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[18]13 Eliz., ch. 5 (1571), *repealed by* The Law of Property Act, 15 Geo. 5, ch. 20, § 172 (1925).

Roman law had recognized as a nominate tort an action *fraus creditiorum* similar in purpose and effect to the Statute of Elizabeth. *See* 1 G. Glenn, *supra* note 1, § 60; Radin, *Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*, 27 Calif. L. Rev. 1, 1-2, nn.1-2 (1938); Radin, *Fraudulent Conveyances at Roman Law*, 18 Va. L. Rev. 109 (1931).

[19]Parties who knowingly participated in the conveyance "incurr[ed] the penalty and forfeiture of one years value of the said lands . . . and the whole value of the said goods . . . ." 13 Eliz., ch. 5, § 2 (1571). Of this amount, "one moitie whereof"—that is, one-half—went to the crown and the other half went to the "party or parties aggrieved." *Id.* A prison term of one half year "without bail" was also provided. *Id. See also* 1 G. Glenn, *supra* note 1, § 61a.

[20]13 Eliz., ch. 5, § 1 (1571).

[21]*Id.*

[22]Mannocke's Case, 3 Dyer 204b, 73 Eng. Rep. 661 (Q.B. 1571). The famous decision in Tywne's Case, 3 Coke 80b, 76 Eng. Rep. 809 Star. Ch. (1601) did not involve a private action. Rather, it was the crown's action to receive its one-half share of the goods transferred.

[23]Bethel v. Stanhope, 78 Eng. Rep. 1037, 1038 (Q.B. 1599).

[24]*Id.*

[25]1 Jac. 1, c. 15 (1603).

[26]21 Jac. 1, c. 19, § 7 (1623).

erty can hardly be expected to step up and admit it. Common law lawyers and judges thus developed bridges from questionable acts commonly associated with fraud to findings of actual fraudulent intent. Called "badges of fraud,"[27] these indicia of transactions imbued with fraud developed into a sort of common law shopping list for those seeking to levy on property thought to be properly part of a debtor's estate.[28] The list's length is testimony to the ingenuity of a debtor who perceives that it is trapped by its creditors.[29]

Several items merited special attention. Transfers for little or no consideration—termed "voluntary conveyances"—were especially suspect,[30] since they drained the pool of assets available for creditors without replenishing the source.[31] Yet, if carried to its logical conclusion, setting aside all gratuitous transfers would void most gifts and other transfers otherwise deemed socially acceptable.[32]

As a consequence, British common law arrived at the view that creditors could not attack voluntary transfers so long as the transferor

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[27]A "badge of fraud" has been defined to be a fact which is calculated to throw suspicion upon a transaction, and calling for an explanation. Peebles v. Horton, 64 N.C. 374, 377 (1870); M. BIGELOW, THE LAW OF FRAUDULENT CONVEYANCES Ch. XVII, at 515 n.2 (Knowlton, ed. 1911). *See also* Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504, 1509 (1st Cir. 1987) (badges of fraud described as "a set of objective criteria . . . use[d] as a basis for inferring fraudulent intent.").

[28]The basic list is published together with Lord Coke's reporting of Tywne's Case. *See* Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Ch. 1601).

[29]The UFTA lists eleven such badges of fraud, from the status of the transferee as an insider to the transfer of essential assets to a lienor who then transfers them to an insider of the debtor. UFTA, *supra* note 1, § 4(b)(1)-(11).

At least one authority existing at the time the UFCA was promulgated divided badges of fraud into major and minor categories. M. BIGELOW, *supra* note 27, at Ch. XVII.

[30]Originally, English common law invalidated all gratuitous transfers. Tywne's Case, 76 Eng. Rep. at 810, note b. *See also* W. ROBERTS, A TREATISE ON THE CONSTRUCTION OF THE STATUTES 13 ELIZ. C. 5, AND 27 ELIZ. C. 4 RELATING TO VOLUNTARY AND FRAUDULENT CONVEYANCES § IV (3d Am. ed. 1845). That view no longer prevails. *See infra* note 33.

[31]As Professor McCoid has noted, there is a difference between "voluntary" conveyances, which were the aim of most early cases, and transfers for inadequate consideration, which are the subject of most modern fraudulent transfer cases. McCoid, *supra* note 4. *See also* M. BIGELOW, *supra* note 27, at 519; O. BUMP, A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS §§ 57, 247 (J. Gray rev. 4th ed. 1896). Nevertheless, modern fraudulent transfer law makes no substantive distinction between the two which, as Professor McCoid notes, probably accounts for confusions such as *Durrett* has caused. McCoid, *supra* note 4.

[32]Early case law in America adopted this strict position. The most famous of these cases was Reade v. Livingston, 3 Johns. Ch. 481 (N.Y. 1818). Although *Reade* was not universally followed, see Howard v. Williams, 1 Bail. 575, 583 (S.C. 1830) (limiting *Reade* to its particular facts), its holding was sufficiently widespread to be a major cause of concern to the drafters of the UFCA. Prefatory Note to UFCA, 7A U.L.A. 427, 428 (1985).

was solvent after the transfer.[33] Solvency, in turn, was defined as the financial state of possessing more assets than liabilities.[34] From the common law lawyer's point of view, this made sense: as long as there were sufficient assets to satisfy all creditors claims, the gift should be valid.[35]

1. Two Problems: Subsequent Creditors and Marginal Solvency.— Stating the principle, however, proved easier than its application. At least two separate questions arose regarding the application and the scope of "insolvency." The first was a question of standing: if a transferor was still solvent after the transfer, were there conditions under which subsequent creditors could use this badge of fraud to attack the transfer? The second question was closely related: if a debtor intentionally transferred just enough property to sympathetic third parties to remain marginally solvent, what recourse did its present creditors have under the fraudulent conveyance laws?

The ultimate[36] answer to the first question was short and predictable: courts tested such transfers as if they were varieties of transfers made with the actual "intent to hinder, delay or defraud."[37] Phrased in this manner, subsequent creditors could attack the transfer only if they bore the burden of proof of the original fraudulent intent.[38] In short, creditors

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[33]*See, e.g.*, Shears v. Rodgers, 110 Eng. Rep. 137, 139 (K.B. 1832); Jackson v. Bowley, 174 Eng. Rep. 426, 429 (Nisi Prius 1841).

[34]*See, e.g.*, H. MAY, THE LAW OF FRAUDULENT AND VOLUNTARY CONVEYANCES 30 (W. Edwards 3d ed. 1908) (insolvency exists "if the property left after the conveyance is not enough to pay [the transferor's] debts"); Jackson v. Bowley, 174 Eng. Rep. 426, 429 (Nisi Prius 1841) ("if the property left after the conveyance is not enough to pay [the transferor's] debts, that is insolvency sufficient for the purposes of the plaintiff in this action.").

[35]As Professor McCoid has noted, however, most early courts dealt with cases with *no* consideration—so called "voluntary conveyances"—as opposed to conveyances for *inadequate* consideration. McCoid, *supra* note 4. Indeed, some early commentators treated transfers for no consideration and transfers for little consideration quite differently. *See* M. BIGELOW, *supra* note 27, Ch. XVII, at 519; O. BUMP, *supra* note 31, §§ 57, 247.

[36]The initial answer was neither clear nor uniform. As stated by Chief Justice Marshall: "With respect to subsequent creditors, the application of [the Statute of Elizabeth] appears to have admitted of some doubt." Sexton v. Wheaton, 21 U.S. (8 Wheat.) 229, 243 (1823). *See also* Williams v. Banks, 11 Md. 198 (1857) (split decision over issue).

[37]Williams v. Banks, 11 Md. 198, 250 (1857); *See also* Stratton v. Edwards, 174 Mass. 374, 378, 54 N.E. 886, 887 (1899) (proof must be of an actual intent to harm a particular creditor; general purpose of securing against hazard of future business permissible); Monroe v. Smith, 79 Pa. 459, 461 (1876); *Ex Parte* Russell, 19 Ch. D. 588, 591, 46 L.T.R. (n.s.) 113, 115 (C.A. 1882).

[38]Elwell v. Walker, 52 Iowa 256, 263, 3 N.W. 64, 70 (1879); Claflin v. Mess, 30 N.J. Eq. 211, 212 (1878). Even if transfer was a matter of public record, however, proof of actual misrepresentation as to ownership of transferred assets could shift the burden of proving a lack of fraudulent intent back to the transferor. Fisher v. Lewis, 69 Mo. 629, 632-33 (1879).

had to show that the transfer was "for the purpose" of hindering, delaying or defrauding future creditors.[39]

This required creditors to connect the transfer's consequences with the transferor's actual intent.[40] Factual circumstances often helped. In *Case v. Phelps*,[41] for example, Phelps had transferred all his assets in trust for his own and his family's benefit; he then immediately started, with no personal capital, a "traveling Indian show."[42] The New York Court of Appeals had little problem in finding that this situation evinced an "intent to defraud creditors whom he [Phelps] expected to owe, and whom possible losses might render him unable to pay . . . . This is fraud in fact . . . ."[43]

Lumping subsequent creditors with all other victims of transfers designed to defraud had other effects. One was that subsequent creditors sought to use badges of fraud from other strands of fraudulent conveyance law in addition to insolvency to fit their situation. One badge of fraud that seemed to attract creditors consisted of a transfer in which the transferor engaged in business knowingly left himself just marginally solvent, and still continued in business.

The rise of this new badge of fraud grew from the perceived underinclusiveness of simple insolvency. When testing insolvency, all that was required was the valuation of assets and liabilities; the result flowed from the numerical difference between the two. But debtors as well as creditors can add and subtract, and debtors often made voluntary transfers which left themselves solvent, but just barely so.[44] Courts found such fact

[39]*E.g.*, Mowry v. Reed, 187 Mass. 174, 177, 72 N.E. 936, 937 (1905); Stratton v. Edwards, 174 Mass. 374, 378, 54 N.E. 886, 887 (1899); Winchester v. Charter, 94 Mass. (12 Allen) 606, 610-11 (1866); Case v. Phelps, 39 N.Y. 164, 169 (1868).

[40]To make matters more difficult, at least one commentator believed that such proof had to be by "clear, full and satisfactory" evidence. O. BUMP, *supra* note 31, § 256, at 296.

[41]39 N.Y. 164 (1868).

[42]*Id.* at 165.

[43]*Id.* at 170.

[44]Bohn v. Weeks, 50 Ill. App. 236, 240 (1893) (invalidating gift of $6500, when assets were $7200 to $7300, and when transferor had outstanding and overdue a $400 note); Williams v. Huges, 136 N.C. 58, 59, 48 S.E. 518, 519 (1904) (finding, as a matter of law, that assets of $11,625 were "not fully sufficient and available for the satisfaction of the [transferor's] creditors" when liabilities equaled $11,500); Black v. Sanders, 46 N.C. (1 Jones) 67, 69 (1854) (finding that retention of $7250 in assets to cover $6848 of liabilities was insufficient, basing holding on poor quality of the assets; "[n]o man would lend money upon such security"); Crumbaugh v. Kugler, 2 Ohio St. 374, 379 (1854) (retention of $48,000 of property insufficient when outstanding debts approximated $42,000; insufficiency "owing to expenses incident to sale, and the sacrifice almost universally affecting forced sales . . . "); Monroe v. Smith, 79 Pa. 459, 461 (1875); Hunters v. Waite, 44 Va. (3 Gratt.) 25, 47 (1846); *Ex Parte* Russell, 19 Ch. D. 588, 591, 46 L.T.R. (n.s.) 113, 115 (C.A. 1882) (finding that solvency cannot be based upon the value of "some odds and ends which can possibly be sold, and on which he puts his fancy value.").

patterns to be badges of fraud—and hence permissible bridges to actual intent to defraud—if such transfers unfairly shifted the risk of liquidating assets into cash onto creditors.[45] In addition, some courts found similar unfairness if solvency after the transfer depended upon volatile or transitory factors, such as the "stability of the market."[46]

This risk shifting was seen as a species of fraud; the transferor's ability to convert his assets into cash was diminished, yet trade continued without notice of this change, usually to the detriment of a creditor who had relied on a prior course of dealing.[47] This was seen as wrong; as noted by Orlando Bump, an early commentator, creditors "have the right to expect satisfaction of their debts out of [the transferor's] property, and [the transferor] has no right, in law or morals, to throw upon them the loss which must necessarily occur in converting it into money."[48]

As a result of this reasoning, several rationales for this badge of fraud developed. It was, for example, a badge of fraud to be barely solvent after making a transfer: if one was left with assets unsuitable for lending;[49] if the resulting solvency depended to a great degree on the stability of the market;[50] or if one did not provide for reasonably anticipated[51] or overdue debts.[52] As with the problem of standing for subsequent creditors, these responses had an *ad hoc* flavor. Each case

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[45]*See, e.g.*, Schreyer v. Scott, 134 U.S. 405, 410 (1890) (stating that it was improper to knowingly "throw the hazards of business in which [the transferor] is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable . . . ."); Mackay v. Douglas, 14 L.R.-Eq. 106, 121, 26 L.T.R. (n.s.) 721, 723 (Ch. 1872) (in which the thought process of someone who transfers assets in trust prior to going into a new business was characterized as follows: " 'I am going into trade; I believe I may make a great deal of money by it, but nobody knows what may happen, therefore I will make myself safe. I will make this large fortune safe by settling it on my wife and children absolutely.' "); O. BUMP, *supra* note 31, § 258, at 297.

[46]Carpenter v. Roe, 10 N.Y. 227, 231 (1851) (solvency cannot depend "on the intelligence to be brought by the next steamer"); Brown v. Case, 41 Ore. 221, 229, 69 Pac. 43, 46 (1902) (solvency cannot be "contingent on stability of the market."). *See also* Izard v. Izard, 1 Bail. Eq. 228, 236-37 (S.C. 1831) ("The fluctuations in the value of property, occasioned by the mercantile condition of the country, cannot however be ranked among [those] casualties [for which the transferor need not provide].").

[47]*See* 1 D. MOORE, A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS' REMEDIES AT LAW AND EQUITY § 8, at 277 (1908).

[48]O. BUMP, *supra* note 31, § 258, at 297.

[49]*E.g.*, Black v. Sanders, 46 N.C. (1 Jones) 67, 69 (1854); *see also supra* note 46. *Cf.* Babcock v. Eckler, 24 N.Y. 623 (1862) (when property retained approximated $10,000, and debts then equalled $900, transfer upheld).

[50]*See* note 46 *supra*. *See also* D. MOORE, *supra* note 47.

[51]*See* D. MOORE, *supra* note 47.

[52]*E.g.*, Bohn v. Weeks, 50 Ill. App. 236, 240 (1893).

stood on its own facts, with easily stated, but loose and amorphous rules as general guides for decision.

2. A Synthesis: The New Business Doctrine Augments Insolvency.— Decisions such as *Case v. Phelps*[53] galvanized early American judicial thinking, and helped to form a synthesis between the standing and marginal solvency cases. The transfer of all of a person's assets in trust for the benefit of his family, in order to begin a "traveling Indian show"[54] did not sit well. Courts saw such opportunism as an impediment to business generally, and a species of fraud perpetrated upon reasonably anticipated future creditors.[55] But at some point such opportunism melds with the prudence of financial planning; courts grappled with conditions under which they would find the requisite impermissible intent. In this struggle, subsequent creditor cases which used strict standing rules were compared with the marginal solvency cases, which seemed to provide an analytical basis for the relaxation of the standing limitations. Given the similarity of the set of injured creditors under both rules, cases began to conflate standing rules, and drop the requirement of actual intent.[56]

This blending of rationales initially produced inconsistent results. In both *Hagerman v. Buchanan*[57] and *Mackay v. Douglas*,[58] for example, transferors had conveyed their property in trust prior to entering into a trading partnership. In both cases, the partnership failed, and creditors whose debts arose after the conveyance sought to set it aside. *Hagerman* allowed the transfer to stand; *Mackay* invalidated it.

Hagerman considered "[t]he character of the business, the degree of pecuniary hazard incurred, the amount of property remaining in the grantor, the value of the property conveyed, [and] the acts and words occurring coincidentally with the transaction."[59] The court gave great weight to the transferor's belief that the partnership, although risky, was "entirely safe."[60] It thus allowed the transferor's testimony to overcome the "strong evidence of fraudulent intent" which arises when "a person has entered into a hazardous business, or engaged in a speculative enterprise, at or soon after the execution of a voluntary conveyance."[61]

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[53]39 N.Y. 164 (1868).

[54]*Id.* at 165.

[55]*Id.*

[56]*E.g.*, Edwards v. Entwisle, 13 D.C. (2 Mackay) 43, 55-56 (1882) (insolvent debtor's intent to defraud *existing* creditors is prima facie evidence of intent to defraud *subsequent* creditors); *see* cases cited *infra* note 74; O. BUMP, *supra* note 31, § 295.

[57]45 N.J. Eq. 292, 17 A. 946 (1889).

[58]14 L.R.-Eq. 106, 26 L.T.R. (n.s.) 721 (Ch. 1872).

[59]45 N.J. Eq. at 302, 17 A. at 948.

[60]*Id.*

[61]*Id.*

In *Mackay*, a managing clerk had been admitted to a jute trading partnership.[62] Immediately prior to his admission, however, he had transferred a valuable leasehold in trust for his wife.[63] Seven months after his admission, the partnership became "embarrassed," and declared bankruptcy four months thereafter.[64] The vice chancellor agreed that the circumstances justified suspicion; he ruled, however, that the transferor bore "the burden of proving . . . that [he was] in a position to make the voluntary settlement."[65]

The transferor attempted to meet this burden with evidence of his good faith and reasonable belief in the success of the venture,[66] which presumably would have sufficed under *Hagerman*. The English court parted ways with *Hagerman's* rationale, however, and held that a justified belief in success was insufficient to sustain the transfer.[67] The court stated that "the motive therefore in executing this settlement was to protect this property against his creditors, if creditors he should have; in other words, to take the bulk of his property out of the reach of his creditors if any disaster should befall him."[68] The court then found that "a man who contemplates going into trade, cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations."[69] As a consequence, the court invalidated the transfer.[70]

Cases such as *Hagerman* and *Mackay* highlighted the uncertain fate of subsequent creditors. Different results could be, and were, obtained depending on the deference given by the deciding tribunal to one's obligations to pay contemplated debts. Courts following *Mackay* required full provision; courts following *Hagerman* and its progeny seemed to allow more leeway for the well meaning, but improvident, transferor.

The confusion caused by the lack of clear guidelines further obscured the main goal of such cases: augmentation of the under-inclusiveness of the concept of solvency as an independent badge of fraud. The evil to be avoided was not the preservation, at any one point in time, of sufficient assets to pay existing creditors; rather, the goal was to prevent the unjust failure of the normal commercial expectation that business

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[62]14 L.R.-Eq. 106, 108, 26 L.T.R. (n.s.) 721, 721.
[63]*Id.*
[64]*Id.* at 109, 26 L.T.R. (n.s.) at 721.
[65]*Id.* at 119, 26 L.T.R. (n.s.) at 722.
[66]*Id.* at 114, 26 L.T.R. (n.s.) at 721.
[67]*Id.* at 121, 26 L.T.R. (n.s.) at 723.
[68]*Id.* at 122, 26 L.T.R. (n.s.) at 723.
[69]*Id.* at 122, 26 L.T.R. (n.s.) at 724.
[70]*Id.*

debt will be paid in a timely manner.[71] Indeed, fraudulent or questionable actions can be taken long before claims ripen or mature,[72] and the solvency concept does not address these at all.

As noted above,[73] the failure of the insolvency badge of fraud to address fully these legitimate questions caused tension. Courts observed that the risk allocation present in transfers leaving the transferor barely solvent was similar to the risk allocation involved in insulating assets from the claims of subsequent creditors.[74] Both types of transfers "rob" the pool of assets—both present and future—from which trade creditors customarily expect their claims to be satisfied.

Cases involving transfers of assets prior to the start of a new business formed the crucible for a new rule, or, in the argot of nineteenth century fraudulent conveyance law, a new badge of fraud. These new business cases, exemplified by *Hagerman* and *Mackay*, contained examples of both types of problems with insolvency as a sufficient badge of fraud. Subsequent creditors were a certainty, and often transferors explicitly sought to insulate their assets from the risks associated with new business.[75] As a consequence of the similarity of rationale, cases tended to drop

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[71] *Id.* at 286 ("The true rule by which the fraudulency or fairness of a voluntary conveyance is to be ascertained . . . is . . . the pecuniary ability of the donor at the time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment."). *See also* Clark, *supra* note 1, at 544 (the "flexible concept of unreasonably small capital, which relates to insolvency in its pragmatic meaning . . . guaranties that mechanical balance sheet tests of insolvency, which can be arbitrary and misleading, do not vitiate the ideal."); Coquillette, *Guaranty of and Security for the Debt of a Parent Corporation by a Subsidiary Corporation*, 30 CASE W. RES. L. REV. 433, 454 (1980) (noting that "determinations [of unreasonably small capital and inability to pay debts as they become due] merely complement the central concept of insolvency by assuring that creditors do not lose their protection by reason of the momentary solvency of [a party] at the time of the transaction.")

[72] *See, e.g.*, NATIONAL BANKRUPTCY CONFERENCE, ANALYSIS OF H.R. 12889, 74th Cong., 2d Sess. 215 (Comm. Print 1936) ("[E]xperience has demonstrated that a dishonest debtor usually begins his fraudulent activities at a time long prior to four months before his bankruptcy . . . .").

[73] *See supra* text accompanying notes 57-70.

[74] *Cf.* Bohn v. Weeks, 50 Ill. App. 236, 239-40 (1893) (combining discussion of transfers made by insolvents with gifts made under reasonable circumstances when stating rationale for rule); Brown v. Case, 41 Ore. 221, 229, 69 Pac. 43, 46 (1902) (discussing approximations of financial ability to pay creditors after transfer for both insolvents and those on the brink of insolvency).

Indeed, if the identity of trade creditors, and the relative amounts of their respective debts, are the same both before and after the questioned transfer, the risk allocation is virtually identical.

[75] *E.g.* Case v. Phelps, 39 N.Y. 164 (1868); Hagerman v. Buchanan, 45 N.J. Eq. 292, 17 A. 896 (1889); Mackay v. Douglas, 14 L.R.-Eq. 106, 26 L.T.R. (n.s.) 721 (Ch. 1872).

the strict rule that the creditor/plaintiff had to prove actual intent to defraud, and allowed subsequent creditors standing to attack such transfers.[76]

These cases categorized the rule differently. Some stated that the transferor was impermissibly "throw[ing] the hazards of business in which he is about to engage upon others."[77] Others phrased the transferor's act as "cast[ing] upon his creditors the hazard of his speculation."[78] However stated, when courts relaxed standing rules and permitted certain acts to imply fraud, a frustrated creditor only had to show a voluntary transfer, the nature of the transferor's business and a lack of a reasonable reserve against foreseeable risks[79] of that new business.[80] Once the creditor made this showing, it became the debtor's burden of dispelling the presumption of fraud that such facts tended to establish.[81]

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[76]*E.g.*, Edwards v. Entwisle, 13 D.C. (2 Mackay) 43, 55-56 (1882) (insolvent debtor's intent to defraud *existing* creditors is prima facie evidence of intent to defraud *subsequent* creditors); *see* cases cited *supra* note 74; O. BUMP, *supra* note 31, § 295.

[77]Schreyer v. Scott, 134 U.S. 405, 410 (1890).

[78]Carpenter v. Roe, 10 N.Y. 227, 232 (1851).

[79]The concept of risk was often expressed as a "hazard" to be avoided. *See supra* notes 77-78. This concept was sometimes applied not to the general risks of businesses, but to the nature of the business itself. Indeed, the first draft of the UFCA applied only to a transferor in a "hazardous" business; this was deleted from the second draft. *See infra* text accompanying notes 87-93. Collier indicates that the omission of the qualifying adjective "hazardous" in the final draft "can be construed only as conscious and deliberate." 4 COLLIER ON BANKRUPTCY ¶ 548.04, at 548-55 to 548-56 n.10 (15th ed. 1988), and thus strongly indicative of a broad application of section 5.

Notwithstanding this change, some early section 5 cases continued to base their holdings on findings that the transferor was involved in a hazardous or speculative business. *See, e.g.*, State v. Nashville Trust Co., 28 Tenn. App. 388, 190 S.W.2d 785 (1944), *cert. denied*, 181 Tenn. 74 (1945); Fidelity Trust Co. v. Union Nat'l Bank of Pittsburgh, 313 Pa. 467, 169 A. 209 (1933), *cert. denied*, 290 U.S. 680 (1934); People Sav. & Dime Bank & Trust Co. v. Scott, 303 Pa. 294, 154 A. 489 (1931). The current view, however, is that even traditional businesses can run afoul of this section. *Compare* Fidelity Trust Co. v. Union Nat'l Bank of Pittsburgh, 313 Pa. 467, 169 A. 209 (1933), *cert. denied*, 290 U.S. 680 (1934) (speculative nature of trading stocks considered) *with* Teitelbaum v. Voss (*In re* Tuller's, Inc.), 480 F.2d 49 (2d Cir. 1973) (business involved was simple drugstore) *and* Zuk v. Hale, 114 N.H. 813, 330 A.2d 448 (1974) (business was that of independent general contractor). *See also* M. BIGELOW, *supra* note 27, Ch. VIII, § 3, at 237.

[80]*E.g.*, Gable v. Columbus Cigar Co., 140 Ind. 563, 567, 38 N.E. 474, 475 (1894); Fisher v. Lewis, 69 Mo. 629, 632 (1879). *See also* M. BIGELOW, *supra* note 27, Ch. VII, § 3, at 230-31; O. BUMP, *supra* note 31, § 258; 1 G. GLENN, *supra* note 1, § 335.

[81]*See* Elwell v. Walker, 52 Iowa 256, 263, 3 N.W. 64, 70 (1879); State v. Nashville Trust Co., 28 Tenn. App. 388, 419, 190 S.W.2d 785, 796-97 (1944), *cert. denied*, 181 Tenn. 74 (1945); Mackay v. Douglas, 14 L.R.-Eq. 106, 113, 26 L.T.R. (n.s.) 721, 722 (Ch. 1872); H. MAY, *supra* note 34, at 30-31.

Such views, however, were hardly uniform, and the dissonance in these decisions led to a movement to unify and harmonize these disparate themes.[82]

B. The Uniform Fraudulent Conveyance Act

Differences over standing rules and the interpretation of insolvency were by no means the only non-uniform interpretations of the Statute of Elizabeth. Because the prevailing analysis used various factors and badges of fraud, each having a different weight—both among themselves and in different cases—non-uniform results were the norm.[83] Consequently, one of the first uniform acts suggested by the National Conference was the Uniform Fraudulent Conveyance Act (UFCA),[84] proposed in 1916, but not adopted until 1918.

This act, ultimately adopted in 25 states,[85] preserved the traditional ability to set aside transactions entered into with actual intent to "hinder, delay or defraud" creditors. But it went beyond the original language of the Statute of Elizabeth, codifying and distilling the cases in an attempt to produce objective tests for classifying a transfer as sufficiently "fraudulent" to allow creditors to ignore the suspect transaction and levy upon the items transferred.

The UFCA was revised three times prior to its adoption. Each draft sought to validate certain gifts against creditor attack.[86] The initial classification chosen upheld such transfers if the transferor was not left in one of three discrete descriptions of financial conditions. These con-

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[82]One attempt was made in Gately v. Kappler, 209 Mass. 426, 95 N.E. 859 (1911), in which the court held that it was appropriate for a transferor to provide against unknown risks, but not to make transfers that unreasonably protected against known debts. *Id.* at 427-28, 95 N.E. at 859.

[83]*Compare* O. BUMP, *supra* note 31, § 255, at 295 (debts guaranteed or which are co-endorsed not counted for purposes of insolvency) *with* M. BIGELOW, *supra* note 27, Ch. VIII, § 3, at 234-35 (opposite).

Indeed, one of the main purposes of the Uniform Fraudulent Conveyance Act was to resolve the split among the states over the validity of gifts as against future creditors. *See* Prefatory Note to UFCA, 7A U.L.A. 427, 428 (1985); *Report of the Committee on Uniform State Laws*, 5 A.B.A.J. 481, 492 n.2 (1919).

[84]*See supra* note 1.

[85]7A U.L.A. 73 (Supp. 1988). Nebraska was the last to adopt it, and did so in 1980. *Id.* It also has been adopted in the Virgin Islands. *Id.*

The UFCA's influence, however, extends beyond those states which have adopted it by statute. Some states which have not enacted the UFCA have accepted its provisions as accurate restatements of the received learning of the Statute of Elizabeth. Molitor v. Molitor, 184 Conn. 530, 535, 440 A.2d 215, 218 (1981) (finding that the UFCA "is largely an adoption and clarification of the standards of the common law.").

[86]*See supra* note 83.

ditions, however, were further distinguished on the basis of what type of creditors could use them.

One sticking point in this classification scheme was the appropriate circumstances under which future creditors could attack a constructively fraudulent transfer. The first draft of the UFCA, delivered to the Conference in 1916,[87] contained the forerunner of section 5 of the current UFCA, which attempted to answer this question.[88] As promulgated, this section provided that a voluntary conveyance for less than fair consideration could be set aside if "the person making it is engaged or is about to engage in a hazardous business or transaction involving risks exceeding his remaining assets."[89] Standing to challenge such transfers was extended to "persons who become creditors . . . as the result of obligations entered into or acts done during the continuation of such business or transaction."[90]

The Conference recommitted the draft to committee.[91] The second draft, promulgated in 1917,[92] significantly changed the text of proposed section 5. It dropped the "hazardous business" concept, and inserted in its place the current language regarding unreasonably small capital.[93] No explanation for the change was made; indeed, the reporter used the same explanatory notes to elaborate the origins of the section.[94]

The text was again returned to committee.[95] The third and final draft of the UFCA was presented in 1918 at the Conference's annual meeting in Cleveland.[96] Although the text of section 5 had not changed,[97] controversy apparently surrounded it. Immediately prior to adoption of the motion recommending the UFCA to all the states, a motion was made to exclude section 5 from the Conference's recommendation.[98] No

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[87]UFCA (First Tentative Draft), *reprinted in* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 254 (1916) [hereinafter 1916 PROCEEDINGS].

[88]UFCA § 5 (First Tentative Draft), *reprinted in id.*, at 258.

[89]*Id.*

[90]*Id.*

[91]*See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 249 (1917) [hereinafter 1917 PROCEEDINGS].

[92]UFCA (Second Tentative Draft), *reprinted in id.*, at 250.

[93]UFCA § 5 (Second Tentative Draft), *reprinted in id.*, at 254.

[94]*Id.* at 255.

[95]*Id.* at 65-66.

[96]UFCA (Third Tentative Draft), *reprinted in* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS OF THE TWENTY-EIGHT ANNUAL MEETING OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 348 (1918).

[97]*Id.* at 353.

[98]*Id.* at 52.

other section was singled out for this exclusion. While this motion to exclude ultimately was defeated, the vote was close; of the twenty-nine states present, only sixteen voted to keep section 5 of the Act.[99] Of the remaining thirteen states, twelve voted to exclude section 5, and one state was divided.[100] Thus born in controversy, section 5 was presented to the states.

C. The Bankruptcy Act, the Bankruptcy Code and the Uniform Fraudulent Transfer Act

Many states soon adopted the UFCA.[101] Following this lead, Congress in 1938 adopted, almost verbatim, the text of the UFCA as the federal fraudulent transfer standard in the Bankruptcy Act of 1898 (Act).[102] The legislative history lauded the UFCA as incorporating the better reasoned cases under the Statute of Elizabeth.[103] Although not adopted, language stating that the federal statute should be interpreted consistently with the UFCA was suggested.[104]

The enactment of the present Bankruptcy Code (Code)[105] in 1978 was the first major revision to the statutory text of fraudulent transfer law. The Code revised the treatment of the characterization of exchange; "reasonably equivalent value" rather than "fair consideration" became the test.[106] The financial stringency test of "unreasonably small capital,"

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[99]*Id.*

[100]*Id.*

[101]It was ultimately adopted by twenty-five states and the Virgin Islands. *See* 7A U.L.A. 427 (1985).

[102]The text was added by amendments to the 1898 Act, known generally as the Chandler Act. Act of June 22, 1938, c. 575, § 1, 52 Stat. 840, 875 (repealed 1979).

[103]"We have condensed the provisions of the Uniform Fraudulent Conveyance Act, retaining its substance, and, as far as possible, its language." NATIONAL BANKRUPTCY CONFERENCE, ANALYSIS OF H.R. 12889, 74th Cong., 2d Sess. 214 (Comm. Print 1936).

[104]*Id.* at 217. Notwithstanding the omission from the final text, one leading commentator states that powerful considerations should be shown to justify a federal court in departing from well reasoned interpretations of the Uniform Act. 4 COLLIER ON BANKRUPTCY, *supra* note 79, ¶ 548.01, at 548-18 n.25.

[105]*See supra* note 1.

[106]The two terms were intended to be equivalent with respect to the measurement of the amount of consideration. COMMISSION REPORT, *supra* note 10, Part I, at 211; Comment, *Guaranties and Section 548(a)(2) of the Bankruptcy Code*, 52 U. CHI. L. REV. 194, 198 n.18 (1985) (citing other relevant legislative history). Under the UFCA, however, "fair consideration" also includes the concept of good faith. UFCA, *supra* note 1, § 3. *See generally* Comment, *Good Faith and Fraudulent Conveyances*, 97 HARV. L. REV. 495 (1983). The Code and UFTA break out the concept of good faith from the concept of consideration, and make it an affirmative defense, validating the transfer or the obligation to the extent the transferee gave with good faith. 11 U.S.C. §§ 548(c) (1982) (initial transferee); 550(b) (mediate and intermediate transferees); UFTA, *supra* note 1, §§ 8(a), (d) (same).

however, remained the same, and the reach of the section was expanded from conveyances to "obligations incurred."[107]

Although the substantive requirements for other types of fraudulent transfers were little changed, the Code significantly altered (although it purported not to) the section condemning transfers by insolvents. In adopting the insolvency test previously used to test "acts of bankruptcy"[108] and other matters[109]—that of liabilities exceeding assets "at a fair valuation"[110]—the Code rejected the Act's and the UFCA's reliance on asset valuation at a "present fair salable value."[111] The difference between the two tests was known,[112] and is significant.[113] The Code thus makes proof of insolvency a much more difficult task.

The Uniform Fraudulent Transfer Act (UFTA),[114] when promulgated in 1984, adopted most of the Code's changes. Indeed, one of the UFTA's

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[107]11 U.S.C. § 548(b)(2)(B)(ii) (1982). *See also supra* note 8 for a discussion of the differences between the text of the Code and the UFCA.

[108]*See, e.g.*, Act, *supra* note 1, §§ 3(a)(3), 11 U.S.C. § 21(a)(3) (repealed 1979) (suffering imposition of a lien while insolvent); 3(a)(5), 11 U.S.C. § 21(a)(5) (repealed 1979) (appointment of a receiver or trustee while insolvent).

[109]The Act used the "fair valuation" formula in determining whether a person was insolvent for purposes of assessing preferences. Act, *supra* note 1, § 60, 11 U.S.C. § 96 (repealed 1979). In addition, under Chapter X of the Act, 11 U.S.C. §§ 501-676 (repealed 1979), a finding of insolvency permitted a court to appoint a receiver. *Id.* at § 115, 11 U.S.C. § 515 (repealed 1979), and triggered certain protections for dissenting shareholders. *Id.* § 216(8), 11 U.S.C. § 616(8) (repealed 1979).

[110]"A person shall be deemed insolvent . . . whenever the aggregate of his property, . . . shall not at a fair valuation be sufficient in amount to pay his debts." Act, *supra* note 1, § 1(19), 11 U.S.C. § 1(19) (repealed 1979). *Cf.* 11 U.S.C. § 101(31) (1982) (" 'insolvent' means . . . financial condition such that the sum of the entity's debts is greater than all of such entity's property, *at a fair valuation* . . . .") (emphasis added).

[111]*See* Act, *supra* note 1, § 67(1)(d), 11 U.S.C. § 107d(1)(d) (repealed 1979).

[112]*See e.g.*, Holahan v. Lewis, 182 F. Supp. 473 (N.D. Fla. 1960). In that case the court stated:

> The Court construes the definition of insolvency as defined in Section 107 as the controlling one in the application of Section 107 sub. d(2)(a) et. seq. The definition of insolvency as enunciated in Section 1, Subdivision 19, carries a far broader sweep than does Section 107. It is apparent that Congress intended less stringent proof of insolvency in Section 107 than in other phases of bankruptcy proceedings.

Id. at 476-77. *See also* 1 G. GLENN, *supra* note 1, at § 272.

[113]Early courts noted this difference and specifically found that the "fair valuation" test produced a more liberal and higher total asset value than did the present fair valuation standard. *In re* Crystal Ice & Fuel Co., 283 F. 1007, 1009-10 (D. Mont. 1922); Stern v. Paper, 183 F. 228, 231 (D.N.D. 1910) (court noted that the fair valuation standard is "liberal" and "ought not to be enlarged."). *See also* Tri-Continental Leasing Corp., Inc. v. Zimmerman, 485 F. Supp. 495, 498 (N.D. Cal. 1980); Meyer v. General American Corp., 569 P.2d 1094, 1096 (Utah 1977). Professor Glenn argued early and strenuously for the abolition of the fair valuation test in favor of one such as was adopted in the UFCA. 1 G. GLENN, *supra* note 1, at § 272.

[114]*See supra* note 1.

implied purposes was to conform the uniform state law with the Code.[115] The UFTA, for example, adopts the reasonably equivalent value test,[116] and the Code's extension of the action to obligations.[117] It also adopts the Code's revised formulation of insolvency.[118]

The UFTA, however, broke some new ground. It changes the formulation of section 5's financial stringency condition to "unreasonably small *assets*."[119] The UFTA defines "assets" as non-exempt property which is not subject to a valid lien.[120] This change was made to avoid confusing working capital concepts—which are the heart of the section—with corporate law concepts of paid in capital[121]—which are irrelevant to fraudulent transfer law.[122] The focus has thus been shifted from adequacy at inception to adequacy at all reasonably foreseeable times.

The UFTA has been rapidly adopted by at least seventeen states,[123] with some inevitable variations, mostly in the UFTA's resurrection of badges of fraud.[124] What remains fairly constant, however, is the thrust

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[115]*See* Prefatory Note to UFTA, *reprinted in* 7A U.L.A. 639 (1985).

[116]UFTA, *supra* note 1, §§ 4(a)(2); 5(a).

[117]UFTA, *supra* note 1, § 4(a)(2)(i). *See also supra* note 8.

[118]UFTA, *supra* note 1, § 2. The UFTA expands upon the Code's definition, however, by creating a rebuttable presumption of insolvency if a transferor is not "generally paying its debts as they become due." *Id.* § 2(b). *See* Cook & Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87, 91-92 (1988).

In the context of passing the UFTA, at least one state has tackled head on the issue of the valuation of assets, adopting views which would have eliminated much of the recent furor fraudulent transfer law has caused. *See, e.g.*, Comments (6) and (7) to proposed CAL. CIV. CODE § 3439.02, CAL. ASSEMBLY J., *supra* note 7, at 8574-75 (valuation of contingent debts).

[119]UFTA, *supra* note 1, § 4(a)(2)(i).

[120]UFTA, *supra* note 1, § 1(2).

[121]For cases apparently using corporate capital concepts, *see, e.g.*, Diller v. Irving Trust Co. (*In re* College Chemists, Inc.), 62 F.2d 1058 (2d Cir. 1933); Wells Fargo Bank v. Desert View Bldg. Supplies, 475 F. Supp. 693 (D. Nev. 1978), *aff'd mem.*, 633 F.2d 225 (9th Cir. 1980).

[122]Reporter's Note to UFCA § 4, 7A U.L.A. 654 (1985). *See also* Comment (4) to Proposed Section 3439.04 of the CAL. CIV. CODE, CAL. ASSEMBLY J., *supra* note 7, at 8577.

[123]These are: Arkansas, California, Florida, Hawaii, Idaho, Maine, Minnesota, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Washington, and West Virginia. 7A U.L.A. 88 (Supp. 1988). Of these seventeen, only nine, California, Idaho, Minnesota, Nevada, New Hampshire, North Dakota, Oklahoma, South Dakota and Washington, had adopted the UFCA. *Id.*

[124]California, for example, did not adopt the UFTA recitation of badges of fraud as indicia of transfers made with the actual intent to hinder, delay or defraud. CAL. CIV. CODE § 3439.04 (West Supp. 1988). It did, however, list those badges of fraud in the legislative history as a "nonexclusive list of some facts which courts have considered . . ." in finding actual intent. Comment (5) to Proposed Section 3439.04 of the CAL. CIV. CODE, CAL. ASSEMBLY J., *supra* note 7, at 8577.

of the section as deterring transfers for less than reasonably equivalent value by businesses bordering on insolvency.

III. Case Law Developments

Despite the basic textual differences in the various sources of fraudulent transfer law, the cases are not so diverse. Indeed, with but a few exceptions, the cases have been true to the original limited intent of the section. It is to a brief review of these cases that this article now turns.

A. Interpretations of Section 5

After the promulgation of the UFCA, section 5 received little independent notice.[125] The case law that did develop, however, did little to illuminate the basic question: what is the scope of the unreasonably small capital section? Several false starts occurred. One view concentrated on the transferor's "working capital"—loosely defined as the excess of current assets over current liabilities.[126] Another looked to a transferor's "capitalization," taken to be the amount of assets placed at risk in the business.[127]

The main view, to the extent that one developed, focused on the transferor's ability to marshal sufficient cash, either from operations, equity infusions, new loans or some combination of these, to pay expected creditors.[128] These cases took a forward looking view, comparing anticipated cash flow against anticipated debt incurrence.[129]

Most cases, however, avoided taking sides with these definitional issues, and instead developed *per se* rules derived from other fraudulent conveyance law notions, and from corporate law generally.[130] Section 5's history, however, as well as the historical purpose of promoting

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[125]*See supra* note 15.

[126]*See, e.g.*, Steph v. Branch, 255 F. Supp. 526 (E.D. Okla. 1966), *aff'd* 389 F.2d 233 (10th Cir. 1968); Zuk v. Hale, 114 N.H. 813, 330 A.2d 448 (1974).

[127]*See, e.g.*, Wells Fargo Bank v. Desert View Bldg. Supplies, 475 F. Supp. 693 (D. Nev. 1978) ("The primary intent of this statute is to prevent an under-capitalized company from being thrust into the market place to attract unwary creditors to inevitable loss while one or more preferred creditors are provided relative safety of a security interest in the company's assets."), *aff'd mem.*, 633 F.2d 225 (9th Cir. 1980).

[128]Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175 (C.D. Cal. 1985); Steph v. Branch, 255 F. Supp. 526 (E.D. Okla. 1966), *aff'd*, 389 F.2d 233 (10th Cir. 1968); *In re* Atlas Foundry Co., 155 F. Supp. 615 (D.N.J. 1957); Jacobson v. First State Bank of Benson (*In re* Jacobson), 48 Bankr. 497 (Bankr. D. Minn. 1985); Jenney v. Vining, 120 N.H. 377, 415 A.2d 681 (1980).

[129]*See, e.g.*, Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175 (C.D. Cal. 1985).

[130]*See infra* text accompanying notes 136 to 166.

"true and plain dealing,"[131] both augur against such iron clad and inflexible rules. Section 5 was created to address perceived inadequacies in section 4[132]—dealing with transfers by insolvents—and even then its adoption was only by a narrow margin.[133] This uncritical expansion not only ignores the section's historical roots, but also ignores the current role of fraudulent transfers involving unreasonably small capital.

B. Uncritical Expansion of the Action

Since its enactment, two lines of cases have expanded the scope of the unreasonably small capital action in unjustifiable ways. The first line of these cases declared that a pledge of all or substantially all of a company's assets *ipso facto* leaves the transferor with unreasonably small capital.[134] The second line holds that a finding of insolvency is *per se* a finding of unreasonably small capital.[135] These cases, at first glance, seem to provide certainty to a confusing area of the law. In reality, however, they preserve an ossified and incorrect view of fraudulent transfer law, and an examination of their reasoning demonstrates their lack of continuing validity.

1. Encumbrance of All Assets.—A few cases have held that if a company has little or no unencumbered assets, it automatically has unreasonably small capital. The seminal case for this proposition is *Diller v. Irving Trust Co.* (In re *College Chemists, Inc.*).[136] There, Diller had sold all of the shares of her company, College Chemists, Inc., to Weiner.[137] Weiner agreed to pay the purchase price by causing his new company, College Chemists, to grant Diller a security interest in all of its assets.[138] When College Chemists was declared bankrupt, the trustee in bankruptcy sued to invalidate the security interest and succeeded. The basis of its claim was that the transfer of the security interest was a fraudulent conveyance of the unreasonably small capital variety.[139]

The Second Circuit, in a one page *per curiam* opinion, affirmed the invalidation. The court had no problem finding unreasonably small capital, because it determined that "there was no capital at all, because

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[131]*See supra* text accompanying notes 18 to 21.

[132]*See supra* note 71.

[133]*See supra* notes 99-100.

[134]*See infra* text accompanying notes 136 to 158.

[135]*See infra* text accompanying notes 159 to 166.

[136]62 F.2d 1058 (2d Cir. 1933) (per curiam).

[137]*Id.*

[138]*Id.*

[139]*Id.* The Second Circuit's opinion is silent with regard to whether the trustee had also sought to show that College Chemists had been made insolvent by the transfer.

Weiner's debt was more than its value."[140] In short, by counting the acquisition debt, College Chemists' balance sheet liabilities exceeded its balance sheet assets. To allow the pledge to stand, in the court's view, would allow "Weiner to carry on the business on an expectancy of profit."[141] The rule in *College Chemists* has been followed at least three times, in each case without detailed analysis.[142] Although the circumstances present in each of these cases may have presented a sufficient factual basis for their result, they certainly do not compel automatic relief.

As recognized by several recent cases,[143] it does not necessarily follow that the lack of unencumbered assets constitutes "unreasonably small" capital. These cases focus on several factors tending to establish the availability of cash to operate the business, rather than on a single factor such as a lack of unencumbered assets. For example, in *Credit Managers Associations of Southern California v. Federal Co.*,[144] General Electric Credit Corp. ("GECC"), a well-known asset-based lender, lent over seven million dollars in a management-lead leveraged buyout. When a labor strike and other setbacks caused financial problems, GECC increased its line by over two and one-half million dollars.[145] The court properly considered this an appropriate and anticipated source of capital.[146]

Similarly, in *Allied Products Corp. v. Arrow Freightways, Inc.*,[147] the New Mexico Supreme Court was faced with the exact situation in *College Chemists*: a sale of a business in which the buyer caused its new company to secure the deferred portion of the purchase price with

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[140]*Id.* at 1058. The court seemed to infer that the purchase price had been too high; since "Weiner's debt" equalled the purchase price, the "value" of the assets could only be less than that amount if Weiner paid too much, with the result that Diller received a debt in excess of the value of the assets sold. The Second Circuit confirmed this reading in Teitelbaum v. Voss (*In re* Tuller's, Inc.), 480 F.2d 49 (2d Cir. 1973). There, under essentially the same facts as in *College Chemists*, the court stated that the security interest in favor of the departing shareholders "left [the transferor] with all of its tangible assets mortgaged. It was [thus] effectively devoid of capital . . . ." *In re Tuller's*, 480 F.2d at 52.

[141]*College Chemists*, 62 F.2d at 1058.

[142]Teitelbaum v. Voss (*In re* Tuller's, Inc.), 480 F.2d 49, 51-52 (2d Cir. 1973); Pirrone v. Toboroff (*In re* Vaniman Int'l, Inc.), 22 Bankr. 166, 186 (Bankr. E.D.N.Y. 1982); Sharrer v. Sandlas, 103 A.D.2d 873, 477 N.Y.S.2d 897, *motion for leave to appeal denied*, 63 N.Y.2d 610, 473 N.E.2d 1190, 484 N.Y.S.2d 1024 (1984), *reargument denied*, 64 N.Y.2d 885, 476 N.E.2d 1008, 487 N.Y.S.2d 1029 (1985). *Accord In re* Atlas Foundry Co., 155 F. Supp. 615, 617 (D.N.J. 1957) (court found that encumbrance of assets to finance leveraged acquisition reduced the "free assets of the bankrupt corporation to a point too low to permit it to carry on its operations with safety.").

[143]*See infra* text accompanying notes 144 to 158.

[144]629 F. Supp. 175 (C.D. Cal. 1985).

[145]*Id.* at 186.

[146]*Id.* at 184.

[147]104 N.M. 544, 724 P.2d 752 (1986).

the company's own assets. In *Allied Products*, however, the new owner invested over $100,000, personally guaranteed over $250,000 in trade debt, and renegotiated other debt.[148] Although the court found that the "security interests made future financing difficult, if not impossible,"[149] it also found, presumably from the new owner's efforts and investments, that there was "uncontradicted testimony" as to remaining capital.[150]

The rule of *College Chemists* ignores these alternative sources of operating capital. As established in *Credit Managers* and in *Allied Products*, borrowing against or selling unencumbered assets is only one of many commercially reasonable methods of raising cash. A company may seek additional equity capital, either through capital contributions from existing owners or by the sale of equity interests to new investors.[151] It may issue unsecured debt. If there is a senior blanket security interest, a new lender may lend more on the same assets secured by a junior lien, the existing lender may itself lend more, or the existing lender may subordinate its interest to a new lender. In short, even though debt may exceed aggregate asset value, as was the case in *College Chemists*, many avenues exist to funnel cash into the company.

In addition to this failure to consider all possible sources of operating capital, *College Chemists* and its progeny disregard the true economic effect of the types of transactions involved. The transaction examined in *College Chemists* involved a pattern familiar to acquisitions generally; a portion of the consideration passing to the selling equity interests is deferred and expected to be paid from future profits of the business sold. The buyer, in turn, uses its newly acquired control to cause the company bought to secure the deferral with the assets of the company sold. Recently, these transactions have been called leveraged buyouts.[152] *College Chemists* condemns these transactions, based upon the view that such transfers allow the transferor to conduct business on "an expectancy of profit,"[153] presumably for the sole benefit of the transferor. But in

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[148]*Id.* at 545, 724 P.2d at 753.

[149]*Id.* at 548, 724 P.2d at 756.

[150]*Id.*

[151]Professor Clark has recognized that the provision of additional equity can be relevant. Clark, *supra* note 1, at 560.

[152]*See generally* Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73 (1985); Baird & Jackson, *supra* note 6; Comment, *supra* note 1. Indeed, some commentators have indicated that the new UFTA may be more lenient in allowing successful fraudulent transfer attacks on leveraged buyouts. Cook & Mendales, *supra* note 118, at 91 ("a leveraged acquisition that left a corporation with little or no unencumbered property would be even more readily subject to attack than under present law").

[153]Diller v. Irving Trust Co. (*In re* College Chemists, Inc.), 62 F.2d 1058, 1058 (2d Cir. 1933). *See also* Mackay v. Douglas, 14 L.R.-Eq. 106, 121, 26 L.T.R. (n.s.) 721, 723 (Ch. 1872) (characterizing the thought process of someone who transfers assets in trust

College Chemists the person benefitting from the transfer—the seller—was *not* the transferor. In short, in a leveraged buyout, the "culprit," if any, is the departing equity owners. It is decidedly not the third party financing the transaction.

Two observations flow from this review of the position of the parties. If a third party finances the leveraged buyout, setting aside its lien or obligation may automatically give rise to an action by the financing party for return of the loan funds or other consideration on equitable theories such as unjust enrichment.[154] Accordingly, in the bankruptcy context the remedy of invalidation is not without its detractions.[155] Second, since the real flow of funds is from the operating company to its departing shareholders, a question exists whether fraudulent transfer law even applies.[156] State laws on dividend restrictions exist for the protection of creditors against shareholders' ability to divert corporate funds.[157] Not only are these statutes crafted to deal directly with this type of transfer, but the original drafters of the UFCA declined to include such a section in the UFCA, even though it had been proposed

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prior to going into a new business as follows: "'I am going into trade; I believe I may make a great deal of money by it, but nobody knows what may happen, therefore I will make myself safe. I will make this large fortune safe by settling it on my wife and children absolutely.'").

[154]*See* RESTATEMENT OF RESTITUTION § 17 (1937) (person who has paid money or void or voidable agreement may receive restitution). *See also* Stratton v. Hanning, 139 Cal. App. 2d 723, 727, 294 P.2d 66, 68 (1956).

[155]In a state court setting, the issue is typically one of priorities between two creditors, the plaintiff and the transferee/defendant. In a bankruptcy context, however, the plaintiff represents *all* creditors, and the benefits of the avoided transfer are preserved for the benefit of the bankruptcy estate. 11 U.S.C. § 551 (1978). Invalidating a transfer and reducing the status of that lien creditor to one of an unsecured creditor may or may not help other unsecured creditors. *See, e.g.*, H. Rep. 595, 97th Cong., 1st Sess. 376 (1977); S. Rep. 989, 95th Cong., 2d Sess. 91 (1982). For example, if significant unencumbered assets existed prior to invalidation, and the claim sought to be invalidated was undersecured, the result of a successful action might be detrimental to unsecured creditors, *i.e.*, it would result in a lesser dividend. Accordingly, the rights inuring to the benefit of a defeated lien creditor are important, and must be considered by the debtor or trustee. Further subordination, to that of equity interests, would require additional and more egregious acts. *See generally* Bank of New Richmond v. Production Credit Ass'n of River Falls (*In re* Osborne), 42 Bankr. 988, 996-97 (W.D. Wisc. 1984); DeNatale & Abram, *The Doctrine of Equitable Subordination as Applied to Nonmanagement Creditors*, 40 BUS. LAW. 417 (1985).

[156]Although cases exist which permit a fraudulent conveyance attack on dividend payments, these cases do not critically consider the policy reasons, examined *infra* at note 158, as to why fraudulent transfer law ought not to be so extended. Consove v. Cohen (*In re* Roco Corp.), 701 F.2d 978, 982 (1st Cir. 1983); Fox v. MGM Grand Hotels, 137 Cal. App. 3d 524, 187 Cal. Rptr. 141 (1983).

[157]*See* Prefatory Note to UFTA, 7A U.L.A. 639 (1985).

in the first draft.[158] Against this background, it makes little sense to bring fraudulent transfer law to bear upon the problem, let alone erect a *per se* rule against such transactions.

2. From Insolvency Directly to Unreasonably Small Capital.—A second line of cases has developed another unwarranted *per se* rule: that a finding of insolvency is automatically a finding of unreasonably small capital.[159] This rule does violence to the carefully structured standing rules applicable to fraudulent transfers and achieves results inconsistent with the UFCA's original intent. As such, it should be repudiated.

The vice of this rule is demonstrated by recalling the standing rules for fraudulent transfers: a transfer which renders a transferor insolvent may be attacked by any of the transferor's then-existing creditors, but not by creditors whose debts arise after the transfer. The rationale for this distinction is that future creditors at least have the opportunity to inquire as to the transferor's financial condition and decline to trade if the information obtained was negative.[160] Those who were creditors at the time of the transaction had no such opportunity.

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[158]Section 8 of the First Tentative Draft of the UFCA was entitled "Payment of Dividend by Corporation." 1916 PROCEEDINGS, *supra* note 87, at 259-60. The Second Tentative Draft omitted this section "as belonging to a Corporation [Act] rather than a Fraudulent Conveyance Act." 1917 PROCEEDINGS, *supra* note 91, at 258. Professor Glenn also believed that restrictions on corporate dividends were not the province of fraudulent conveyance laws. 1 G. GLENN, *supra* note 1, § 604, at 1043-47. *See also* Coquillette, *supra* note 71, at 446-48.

Professor Clark argues strenuously for coverage of corporate dividends by fraudulent transfer laws, based in part on his view that dividend restriction statutes are "virtually meaningless" because they are rigid, bright line tests, focusing on "formalistic accounting conventions" rather than on the UFCA's "purposive concept of capital." Clark, *supra* note 1, at 556, 558-59 n.154. Professor Clark seems to discount the UFCA's historical origins, and also gives too little deference to state legislatures in the control of the corporate creatures they create. Instead, he exalts the flexibility of the common law over the perceived restricting influence of legislation. It makes little sense, however, to enact statutes specifically designed to regulate the shareholder/corporation relationship if common law concepts will always, or nearly always, usurp their function. Given the set of balances a legislative body strikes in creating corporations with their limited liability to exist, Professor Clark's position seems to pass wide of the mark.

[159]United States v. Gleneagles Investment Co., Inc., 565 F. Supp. 556, 580 (M.D. Pa. 1983), *aff'd sub nom.* United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986); New York Credit Men's Adjustment Bureau, Inc. v. Adler, 2 Bankr. 752, 756 (S.D.N.Y. 1980); White v. Coon (*In re* Purco, Inc.), 76 Bankr. 523, 529 (Bankr. W.D. Pa. 1987); Louisiana Indust. Coatings, Inc. v. Pertuit (*In re* Louisiana Indust. Coatings, Inc.), 31 Bankr. 688, 698 (Bankr. E.D. La. 1983) ("A negative capital position represents *ipso facto* an unreasonably small capital with which to do *any* business") (emphasis in original).

[160]Crumbaugh v. Kugler, 2 Ohio St. 374, 379 (1854) (subsequent creditors "give credit to their debtor as he is—for what he has, not for what he once had"); Monroe v. Smith,

In contrast, a transfer which leaves a transferor with unreasonably small capital may be attacked not only by present creditors, but future creditors as well. This standing rule derives from the historical antecedents of the section that equated "securing against the hazards of business" with fraud on future creditors, since they were the target of the malign intent.[161]

Regardless of the origin of the distinction in standing, however, the distinction exists. At bottom, it implies strongly that a transferor may be insolvent, and yet still retain an adequate amount of capital or cash flow. This proposition is not as wild as it may first seem: insolvency under the UFCA developed into an incredibly creditor-protective calculation. Assets which could not be quickly sold were given no value, regardless of their cost;[162] contingent assets could be disregarded;[163] and guaranties and other contingent obligations were valued at face,[164] with little consideration of offsetting rights.[165] As a consequence, companies which held relatively liquid assets such as land could quite easily be insolvent, but could still operate effectively and could generate sufficient

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79 Pa. 459, 462 (1876) ("It is difficult to perceive how one who had knowledge of such a conveyance before he dealt with the grantor, and hence must have acted in view of it, could, by any possibility, be defrauded thereby"). *See also* Todd v. Nelson, 109 N.Y. 794, 797, 16 N.E. 360, 364-65 (1888).

[161]Schreyer v. Scott, 134 U.S. 405, 409-10 (1890); Winchester v. Charter, 94 Mass. (12 Allen) 606, 610-11 (1866); D. MOORE, *supra* note 47, § 8, at 277.

[162]Corbin v. Franklin Nat'l Bank (*In re* Franklin Nat'l Bank Securities Litigation), 2 Bankr. 687, 711-12 (E.D.N.Y. 1979), *aff'd mem.*, 633 F.2d 203 (2d. Cir. 1980) (book value of stock of subsidiary had no present fair salable value; court reasoned that since "there were no purchasers or bidders for [the stock] in May and June of 1974, [the] stock, realistically speaking, had no value."); Chase Nat'l Bank v. United States Trust Co., 236 App. Div. 500, 503, 260 N.Y.S. 40, 44 (1932) ("Not every asset, but only such as are salable, enter the equation."); Fidelity Trust Co. v. Union Nat'l Bank of Pittsburgh, 313 Pa. 467, 169 A. 209 (1933), *cert. denied*, 291 U.S. 680 (1934) (reversing trial court's refusal to give "present" controlling meaning).

[163]*See, e.g.*, Kepler v. Atkinson (*In re* Atkinson), 63 Bankr. 266, 269 (Bankr. W.D. Wisc. 1986) (unmatured claim against insolvent person has no value under Wisconsin version of UFCA). *Cf.* Wight v. Rohlffs, 48 Cal. App. 2d 696, 121 P.2d 76 (1942) (under precursor of UFCA; court only considered assets subject to court process in California and excluded consideration of transferor's interest in Massachusetts probate estate).

[164]Chase Manhattan Bank (N.A.) v. Oppenheim, 109 Misc. 2d 649, 652, 440 N.Y.S.2d 829, 831 (N.Y. Sup. Ct. 1981); Marine Midland Bank v. Stein, 105 Misc. 2d 768, 770, 433 N.Y.S.2d 325, 327 (Sup. Ct. 1980). *But cf.* Cate v. Nicely (*In re* Knox Kreations, Inc.), 474 F. Supp. 567, 571-72 (E.D. Tenn. 1979), *aff'd in part, rev'd in part on other grounds*, 656 F.2d 230 (6th Cir. 1981) (corporate guaranty which was not likely to be enforced not counted as liability under Tennessee version of UFCA); *In re* Xonics Photochemical, Inc., 841 F.2d 198, 200 (7th Cir. 1988) (contingent liabilities must be discounted to reflect probability that contingency will materialize).

[165]Tri-Continental Leasing Corp., Inc. v. Zimmerman, 485 F. Supp. 495, 499 (N.D. Cal. 1980); Bergquist v. First Nat'l Bank of St. Paul (*In re* American Lumber Co.), 5 Bankr. 470, 475-76 (D. Minn. 1980); 1 COLLIER ON BANKRUPTCY, *supra* note 79, ¶ 101.31[5], at 101-66.

capital to augment the existing capital base.[166] Therefore, the application of a *per se* rule subsuming unreasonably small capital within insolvency would appear unwarranted. Its blind application produces an antinomy; the automatic extension of standing to future creditors upon proof of insolvency—which is a result consciously not included in the statute.

These two *per se* rules combine with the intensely fact-bound nature of the analysis in all other cases to create a featureless framework for critical analysis of unreasonably small capital cases. Given the action's history, and the general trend of current case law, a synthesis is possible which contains a principled and logical analytical framework for future cases. It is to that task that this article now turns.

IV. Toward True and Plain Dealing: A Proposed Synthesis

With the Code's and the UFTA's softening of creditor-protective definitions of insolvency,[167] lawyers seeking to set aside questionable transfers will inevitably come to rely more heavily upon the unreasonably small capital section.[168] It does not require proof of insolvency and neatly avoids the issue of standing. In addition, the case law interpreting the section is scarce and, at best, cryptic, allowing for good faith arguments for expansion.

Against this background, it is inevitable that arguments will arise pressing for new or expansive interpretations of this action.[169] Fast application of the new UFTA or the new provisions of the Code may, however, outpace the original intent behind the action; that is, curing specific perceived deficiencies with the concept of insolvency.[170] The received learning and the jurisprudence of section 5 argue against such easy applications.

In addition, the frailties of the two lines of cases set forth above can point to a better understanding of the unreasonably small capital action. First, the deficiencies of *College Chemists* and its progeny un-

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[166]*Cf.* American Insulator Co. v. Marsh Plastics, Inc. (*In re* American Insulator Co.), 60 Bankr. 752, 755 (Bankr. E.D. Pa. 1986) (valuation of land acquired in 1920 at cost, as indicated by applicable rule, would unduly skew insolvency calculation in favor of insolvency; recent appraisals used instead).

[167]*See supra* text accompanying notes 108 to 113.

[168]*See, e.g.*, Alces & Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. Ill. L. Forum 527, 560 (categorizing application of unreasonably small assets test of UFTA as "easy, even tautological" in the case of failed businesses); Cook & Mendales, *supra* note 118, at 91 ("a leveraged acquisition that left a corporation with little or no unencumbered property would be even more readily subject to attack than under present law").

[169]*Id.*

[170]*See supra* text accompanying notes 70 to 72.

derscore the importance of a broad definition of capital.[171] Next, the inherent contradiction of cases making the unwarranted leap from insolvency to unreasonably small capital shows that inadequacy of capital must stand on its own ground to preserve the structure created by the standing rules of both the UFCA and the UFTA.[172] Each of these concerns is addressed below.

A. Defining "Capital"

Initially, in order to determine what is "unreasonably small" capital, the definition of "capital" or "assets"[173] must be made clear. One recent case surmised that it was "the unadjusted value of all assets, however encumbered."[174] The UFTA definition of "assets," however, rejects this view by explicitly excluding "assets" to the extent they are subject to valid encumbrances.[175] Also rejected is any notion that "capital" includes only invested or "risk" capital,[176] and the notion that "capital" consists only of free or unencumbered assets.[177]

So much for what "capital" is not. Some hint of what it is can be gleaned from the text of the statute. Both the Code and the UFTA require that the "capital" or "assets" be adequate "in relation to the [transferor's] business or transaction."[178] This formulation forces a forward looking view; it requires a transferor to retain adequate wherewithal for future businesses or transactions.

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[171]*See supra* text accompanying notes 150 to 152.

[172]*See supra* text accompanying notes 159 to 166.

[173]The remainder of this article will refer to "capital" rather than assets. This use comports with the intent of the UFTA to clarify, rather than change, the scope of the section. *See* Reporter's Note to UFTA § 4(b)(1), 7A U.L.A. 654 (1985).

[174]Jacobson v. First State Bank of Benson (*In re* Jacobson), 48 Bankr. 497, 501 (Bankr. D. Minn. 1985).

[175]Section 1(2) defines "asset" to mean "property of a debtor, but the term does *not* include: (i) property to the extent it is encumbered by a valid lien . . ." (emphasis supplied). *Cf.* Comment (3) to Proposed Section 3439.04 of the CAL. CIV. CODE, CAL. ASSEMBLY J., *supra* note 7, at 8576-77 ("The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer.").

[176]"The reference to 'capital' in the [UFCA] is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for the stock issued. The special meanings of 'capital' in corporation law have no relevance in the law of fraudulent transfers." Comment (4) to Proposed Section 3439.04 of the CAL. CIV. CODE, CAL. ASSEMBLY J. 8569, *supra* note 7, at 8577. *See also* Reporter's Note to UFTA § 4, 7A U.L.A. 654 (1985).

[177]*See supra* text accompanying notes 136 to 158; Clark, *supra* note 1, at 555 n.140 (equating "net worth" with "capital").

[178]11 U.S.C. § 548(b)(2)(B)(ii) (1982); UFTA, *supra* note 1, § 4(a)(2)(i).

Courts have recognized this perspective; "capital" has been extended to reasonably foreseeable future cash flow, be it from operations,[179] equity capital infusions,[180] residual equity in equipment obtained through the use of purchase money financing[181] or new and commercially reasonable loans.[182] As a consequence, the test for unreasonably small "capital" should include these concepts; the aggregate amount of "capital," in short, would include all reasonably anticipated sources of operating funds, which may include new equity infusions, cash from operations or cash from secured or unsecured loans over the relevant period.[183]

B. Determining "Unreasonably Small" Amounts of Capital

If capital comprises all available cash resources over the relevant period, what constitutes "unreasonably small" amounts of it? An outline of the answer can be given by examining existing unreasonably small capital cases for the elements of a successful case.[184] This examination

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[179]Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175, 184 (C.D. Cal. 1985) (consideration of future cash flow from operations in determining whether remaining capital was sufficient).

[180]Allied Products Corp. v. Arrow Freightways, Inc., 104 N.M. 544, 724 P.2d 752 (1986); Kupetz v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 77 Bankr. 754, 762 (C.D. Cal. 1987) (failure of witness to consider effect of principal shareholder's secured guaranty a factor in not believing testimony regarding unreasonably small capital), *aff'd sub nom.* Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988).

[181]Lackawanna Pants Mfg. Co. v. Wiseman, 133 F.2d 482, 485 (6th Cir. 1943).

[182]*Id.* (court considered commercial reasonableness of purchase money chattel mortgage); Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175 (C.D. Cal. 1985) (court considered, after increase had occurred, likelihood at time of transfer that primary lender would increase credit line). *See also* Kupetz v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 77 Bankr. 754, 762 (C.D. Cal. 1987) (failure of witness to consider possible refinancing or new loans a factor in not accepting witness' conclusion of unreasonably small capital), *aff'd sub nom.* Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988).

[183]As used in this context, "relevant period" means that time span from the date of the transfer to the date of non-payment, limited only by the applicable statute of limitations. By way of example, if the statute of limitations is four years, the non-payment occurs one year after the transfer, but the transferor's expected capital, when judged from the vantage point of transfer, would have been adequate for three years, no action will lie. *See infra* text accompanying notes 235-54. Similarly, under this hypothetical, no action will lie for any failures to pay which occur after four years due to the bar of the statute of limitations. Finally, again under this hypothetical, a non-payment which occurs three and one-half years after the transfer—within the four year statute of limitations but beyond the period of adequacy of capital—would be actionable.

[184]In this outline, pre-UFCA cases and authorities are used. This use is not only appropriate given the paucity of section 5 cases, *see supra* note 15, but also due to the uncertain origins of section 5 itself. As noted above, section 5 was hotly contested in the original convention which adopted the UFCA. *See supra* text accompanying notes 98-100. This disagreement indicates that the final text was less than a perfect fit for the concept as developed by the common law. The use of pre-UFCA cases to tailor the unreasonably small capital action as an accessory and adjunct to the insolvency branch of constructively fraudulent transfers should thus be permissible.

demonstrates that, by definition, the challenger must first establish that the transfer was for less than a reasonably equivalent value. Once shown, the creditor must then show the following: the transfer was made by a person in business or for a business transaction; that non-payment of the plaintiff's claim was a reasonably foreseeable effect given the amount of the transferor's remaining and reasonably foreseeable cash resources; and that, in at least a "but for" sense, the lack of adequate resources caused the non-payment.

1. The First Requirement: A Business or Business Transaction.— The first requirement is textual: a transfer must be made by one who is "engaged or is about to engage in a *business.*"[185] Additionally, the business must be one that requires working capital, or liquid funds, in the business' daily activities.[186] The historical antecedent for this requirement lies in the notion that carrying on a business is an implicit representation of an ability to pay those debts incurred in the business; no such requirement attends to individuals in their personal affairs.[187]

The statute also extends to those "engaged or . . . about to engage in a . . . *transaction*" for which the remaining property is inadequate.[188] The statute is silent as to the distinction between a "business" and a "transaction." One case, however, has interpreted "transaction" to cover joint ventures; that is,temporary associations to achieve a limited business purpose.[189] This reading is consistent with the text of the original statute;

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[185]UFCA, *supra* note 1, § 5 (emphasis supplied). *See also* 11 U.S.C. § 548(a)(2)(B)(ii) (1982); UFTA, *supra* note 1, § 4(a)(2)(i).

[186]Iannacone v. Capital City Bank (*In re* Richards), 58 Bankr. 233 (Bankr. D. Minn. 1986) (company which merely held title to assets for purposes of securing a debt was not engaged in business which needed capital); Jacobson v. First State Bank of Benson (*In re* Jacobson), 48 Bankr. 497 (Bankr. D. Minn. 1985) (section 548(a)(2)(B)(ii) found inapplicable because, although debtor was in business, no showing that additional capital was necessary; indeed, transferee showed that business could be run more effectively with the use of less capital). *Cf.* Tarbox v. Zeman (*In re* Zeman), 60 Bankr. 764 (Bankr. N.D. Iowa 1986) (fact that involuntary transfer forced transferor to cease business established that property was necessary to business, and that its transfer left the transferor with unreasonably small capital).

[187]*See, e.g.*, Winchester v. Charter, 94 Mass. (12 Allen) 606 (1866); Todd v. Nelson, 109 N.Y. (64 Sickels) 316, 16 N.E. 360 (1888). *See also* Kepler v. Atkinson (*In re* Atkinson), 63 Bankr. 266, 269 (Bankr. W.D. Wisc. 1986) (mother's guaranty of son's debt was not a business or transaction contemplating business).

[188]11 U.S.C. § 548(a)(2)(B)(ii) (1982); UFTA, *supra* note 1, § 4(a)(2)(i); UFCA, *supra* note 1, § 5.

[189]Holcomb v. Nunes, 132 Cal. App. 2d 776, 283 P.2d 301 (1955). *See* Kepler v. Atkinson (*In re* Atkinson), 63 Bankr. 266, 269 (Bankr. W.D. Wisc. 1986), in which the court held that a mother's guaranty of her son's debts was not a "transaction" of the type contemplated in the UFCA, and stating that the section "appear[s] to be principally directed to those situations in which a party is about to engage in a business venture . . . ."

it limits the population of potential plaintiffs to those who become creditors "during the *continuance* of such . . . transaction."[190] The UFTA carries on this concept with its requirement that the "remaining assets of the debtor [be] unreasonably small *in relation to* the . . . transaction."[191] Both of these sections limit the type of transactions which may qualify; both require a showing of a need for capital or assets for the continuance of the transaction. This limitation also leads to the second requirement: that non-payment was a reasonably foreseeable effect of the lack of adequate resources.

2. The Second Requirement: A Reasonably Foreseeable Connection.—The second requirement can most easily be seen as an analogue to section 4 of the UFCA dealing with transfers by insolvents. The objective of section 4 was creditor protection by requiring the transferor to retain sufficient assets to meet all debts.[192] Yet, as the early cases showed, many debtors took advantage of vagaries surrounding asset valuation and difficulties regarding the proof of intent, and left themselves solvent, but just barely so.[193]

Section 5 of the UFCA was an attempt to close these gaps. It imposes an additional burden on transferors; they must not leave themselves with unreasonably small—or inadequate[194]—capital or reserves. This protects present creditors from valuation squabbles and future creditors from the debtor who would gamble on their extension of credit.[195] It is important to note, however, that the statute does not make the transferor the insurer of adequacy; it only condemns as fraudulent those transfers which leave the transferor with "*unreasonably* small capital."

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[190]UFCA, *supra* note 1, § 5 (emphasis supplied); *see also* 11 U.S.C. § 548(a)(2)(B)(ii).

[191]UFTA, *supra* note 1, § 4(a)(2)(i) (emphasis supplied).

[192]*See supra* text accompanying notes 53 to 82.

[193]*See supra* text accompanying notes 44 to 52; M. BIGELOW, *supra* note 27, § 3, at 230-33.

[194]The Reporter's Notes to the UFTA indicate that "unreasonably small" and "inadequate" are essentially interchangeable. Reporter's Notes to § 4 of the UFTA, 7A U.L.A. 654 (1985) ("The subparagraph focuses attention on whether the amount of all assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage").

[195]The classes protected against this gamble are broad. They include taxing agencies as well as regulatory authorities. United States v. Gleneagles Investment Co., 565 F. Supp. 556 (M.D. Pa. 1983) (indication that factor in finding unreasonably small capital under Pennsylvania law was that transferor failed to provide adequately for union health care contributions and for environmental "backfilling" obligations to Pennsylvania), *aff'd sub nom.* United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), *cert. denied sub nom. McClellan Realty Co. v. United States*, 107 S. Ct. 3229 (1987); United States v. Vertac Chem. Corp., 671 F. Supp. 595, 617 F. Supp. 595, 617 (E.D. Ark. 1987) (United States and state environmental agencies have standing to attack fraudulent conveyances under Tennessee version of UFCA); United States v. 58th Street Plaza Theatre Inc., 287 F. Supp. 475 (S.D.N.Y. 1968) (taxing authority).

But what is an "unreasonable" amount? As noted in many cases, the exact amount varies with the particular case.[196] This does not translate, however, into a toothless, relative, standard. Rather, the existing cases can be distilled into the following: capital remaining after a transfer is unreasonably small when the unpaid creditor/plaintiff can show its non-payment was a reasonably foreseeable effect[197] of the transferor's failure to retain, or failure to provide for, an adequate amount of resources from and after the transfer to satisfy the unpaid plaintiff/creditor's claim.[198]

An essential element of this formulation is the presence of a connection between the disputed transfer and non-payment of the creditor's claim. This requirement is historical; section 5 was distilled from cases which allowed creditors to attack a transfer only if they could somehow connect their non-payment with some universally agreed inference that the transferor, at a relevant time, knowingly left itself with too little reserves.[199]

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[196]Wells Fargo Bank v. Desert View Bldg. Supplies, 475 F. Supp. 693 (D. Nev. 1978), *aff'd mem.*, 633 F.2d 225 (9th Cir. 1980); Zuk v. Hale, 114 N.H. 813, 330 A.2d 448 (1974); 1 G. GLENN, *supra* note 1, § 335.

[197]If the claim was subject to a bona fide dispute, the showing would entail proof that the claim was genuine, and that non-payment, after the normal course of dispute resolution, was the result of inadequate capital. *Cf.* 11 U.S.C. § 303(h)(1) (1982) (only claims not subject to bona fide dispute may be counted in meeting jurisdictional minimum amount for involuntary bankruptcy). In addition, holders of subsequent claims related to expenses which are necessary, such as utilities and trade suppliers, will fare better than holders of subsequent non-essential expenses, in that holders of such "non-essential" claims will have a more difficult time showing a connection between the transfer and their non-payment.

[198]*See* Comment, *supra* note 5, at 1509 (assuming transfers that leave transferors with few unencumbered assets must be "causally linked" to inability to pay debts in order to create fraudulent transfer liability). *See also* cases cited *infra* note 199; Kepler v. Atkinson (*In re* Atkinson), 63 Bankr. 266, 269 (Bankr. W.D. Wisc. 1986) (Capital retained must be measured "relative to the nature of the venture.").

This test may be applied differently depending upon whether the plaintiff is an individual creditor, a bankruptcy trustee or debtor in possession. In the case of the private party plaintiff, the date of non-payment will set the relevant period for the review of the adequacy of capital. *See supra* note 183. With respect to trustees and debtors in possession, the plaintiff is a representative of all creditors, either under the strong arm powers of 11 U.S.C. § 544(b) or under 11 U.S.C. § 550(a). As such, the trustee or debtor in possession would be able to use an extended period of relevancy, bounded at one end by the date of the transfer and at the other end by the date fixed by the applicable statute of limitations. In addition, a trustee or debtor in possession would have a relaxed version of causation; the hierarchy of necessity would no longer be relevant given the broad representation of the trustee. *See supra* note 197. *See also* Moore v. Bay, 284 U.S. 4 (1931).

[199]In Sexton v. Wheaton, 21 U.S. (8 Wheat.) 229 (1823) for example, the Supreme Court considered the connection between the transfer and the loss claimed by the creditor. In *Sexton*, there had been a two year delay between the challenged transfer and the creation of the creditor's debt. In finding that this period of time was sufficient to cleanse

This type of requirement, although not articulated as such, has played a vital role in many section 5 cases finding fraudulent transfers. In *Fidelity Trust Co. v. Union National Bank*,[200] for example, a depression-era bank president engaged in stock speculation to support artificially the price of the bank's stock. Even though the president was found to be solvent after the transfer in question—by at least $80,000[201]—the court looked to the nature of the speculation and found that "[t]he precarious chance of successful issue of business conducted with such slender margin must be considered,"[202] and that the scale of business rendered the remaining capital inadequate.[203] In short, the wide swings inherent in such trade required large reserves; by deliberately reducing the reserves by the transfers—which went to premium payments on the life insurance policies that were the subject of the lawsuit—it was reasonably foreseeable that his resultant insufficiency of capital would result in unpaid creditors.[204]

Similarly, in *McBride v. Bertsch*,[205] a fruit juice manufacturer and seller conveyed all his personal property, worth $30,000, in trust for his

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the transfer, the Court noted that at the time of the transfer, Wheaton, the transferor, "had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart." *Id.* at 250. *See also* Kearny Plumbing Supply Co. v. Gland, 105 N.J. Eq. 723, 149 A. 530 (1930) (refusing, under New Jersey version of section 5, to draw "unfavorable inference" as to unreasonably small capital when non-payment occured two years after transfer); Mackay v. Douglas, 14 L.R.-Eq. 106, 122, 26 L.T.R. (n.s.) 721, 723 (Ch. 1872) ("If a person enters into no contract which would result in insolvency, and was not contemplating anything which might have that result, such a settlement would be perfectly good. . . ."); M. BIGELOW, *supra* note 27, § 3, at 231 ("There must be a connection between the gift and the subsequent credit.").

More recently, in *In re* Process-Manz Press, Inc., 236 F. Supp. 333, 346 (N.D. Ill. 1964), *rev'd on jurisdictional grounds*, 369 F.2d 513 (7th Cir. 1966), *cert. denied sub nom.* Limperis v. A.J. Armstrong Co., Inc., 386 U.S. 957 (1967), the court found evidence of unreasonably small capital from a demonstrated inability to pay debts as they matured after the transfer, and from numerous bank overdrafts. *See also* New York Credit Men's Adjustment Bureau, Inc. v. Adler, 2 Bankr. 752, 756 (S.D.N.Y. 1980).

[200]313 Pa. 467, 169 A. 209 (1933), *cert. denied*, 290 U.S. 680 (1934).

[201]*Id.* at 476, 169 A. at 212-13.

[202]*Id.* at 482, 169 A. at 215.

[203]*Id.* at 476, 169 A. at 213.

[204]That different amount of reserves would be required by different transferors was a point noted early and widely. M. BIGELOW, *supra* note 27, § 3, at 233, 237; O. BUMP, *supra* note 31, § 257, at 297. *See also* Bakst v. Presley (*In re* E.D. Presley Corp., Ltd.), 44 Bankr. 781, 783 (Bankr. S.D. Fla. 1984) (operation of Canadian securities firm requires substantial liquid assets). Indeed, in the early case of Hunters v. Waite, 44 Va. (3 Gratt.) 25 (1846), the transferor was characterized as "a man of sanguine temperament, and extremely imprudent habits." *Id.* As such, the Court scrutinized carefully his transfer, and found it lacking for failure to consider his "imprudent habits" in providing for the future. *Id.* at 47.

[205]McBride v. Bertsch, 58 F.2d 797 (W.D. Mich. 1930), *aff'd*, 58 F.2d 799 (6th Cir. 1932).

family. At the time of the transfer, he had $11,000 in debts.[206] Although "substantially" all of these debts were paid when the transferor went bankrupt three year later,[207] the court found that the seller had "practically no capital," but an intent "to continue in the business and to incur large indebtedness in and about its expansion and operation."[208] These expansion plans highlighted the inadequacy of the remaining capital. A business may exist on the cash and income it generates; it is reasonably foreseeable, however, that expansion financed concurrently from income may require some reserves. Without such reserves, the court invalidated the transfer.[209]

McBride left unanswered a crucial question—whether the transfer would have withstood scrutiny if no expansion was contemplated. Recent cases have addressed this problem by concentrating on a business' ability to generate sufficient cash from operations, or to issue debt or equity securities for cash.

One such case was *Wells Fargo Bank v. Desert View Building Supplies, Inc.*[210] There, the sole shareholder of a corporation caused the corporation to borrow funds on a secured basis.[211] He later removed these funds from the corporation to pay a personal loan to the same bank.[212] Although the corporation had equity of over $57,000 after the transaction,[213] the court noted that, prior to the transaction, the corporation had only been marginally profitable. The incurrence of the secured loan thus not only reduced the pool of unsecured assets, it imposed a further drain on the corporation's cash flow through the introduction of new and additional debt service. Accordingly, its only hope was to expand sales—with the hope of expanding profits and additional cash—but the debt service on the secured loan effectively prevented it from successfully undertaking this expansion.[214] With this connection between the reasonably anticipated effect of the transfer and

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[206] *Id.* at 797.

[207] *Id.*

[208] *Id.* at 798.

[209] *Id.*

[210] 475 F. Supp. 693 (D. Nev. 1978), *aff'd mem.*, 633 F.2d 225 (9th Cir. 1980). In Sweney v. Carroll, 118 N.J. Eq. 208, 178 A. 539 (1935), decided under section 5 of the UFCA, the resources of an individual who was building a house were at issue. The plaintiffs were unsatisfied trade creditors. In deciding whether a previous transfer had left the individual with sufficient funds, the court took into account that "[t]here was no intent or expectation of building the house on credit." *Id.* at 215, 178 A. at 543. Since the court found that this intent was not unreasonable, it upheld the transfer. *Id.*

[211] 475 F. Supp. 693, 695 (D. Nev. 1978), *aff'd mem.*, 633 F.2d 225 (9th Cir. 1980).

[212] *Id.*

[213] *Id.*

[214] *Id.* at 697.

the non-payment thus established, the court found the transfer invalid.[215]

A more detailed analysis of cash flow was at issue in *Credit Managers Association of Southern California v. Federal Co.*[216] There, General Electric Credit Corporation (GECC) had financed a management-lead leveraged buyout, in which management purchased their company, Crescent Foods, from The Federal Company. As in *Desert View*, management caused their new company, Cresent, to pledge its assets as security for both the loan from GECC and the deferred portion of the purchase price to Federal. Unlike *Desert View*, however the court found that the extensive cash flow projections prepared to convince GECC to make its loan reasonably showed that Cresent would have "sufficient expected cash flow to stay in business."[217] Under the circumstances, the court found the remaining capital to be adequate.[218]

Other cases have also looked to cash flow, albeit in more oblique manners. Some cases have looked to "working capital," which is sometimes defined as the difference between liquid or short term assets and short term liabilities. Thus, in *Zuk v. Hale*,[219] a special equity master found the transferor had $5,000 in "working capital" at the time of the transfer.[220] Although there was evidence that the transferor's business of being a general contractor generally required $7,000 to $13,000 in such "working capital,"[221] the transferor's retention of a lower figure was supported on testimony that it would be sufficient in that case if receivables were timely paid.[222] In other words, the amount of the contractor's expected cash receipts was adequate to cover his expected debts.

A different result was reached in *Steph v. Branch*.[223] In *Steph* a shareholder sold the stock in his business to another, who in turn secured the deferred portion of the purchase price with the assets of the business.[224] The business also agreed to pay this deferred portion over time.[225] Again, there was a finding of solvency at the time of the transfer,[226] but there was testimony from accountants that the range of "reasonable" capital

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[215] *Id.*

[216] 629 F. Supp. 175 (C.D. Cal. 1985).

[217] *Id.* at 184.

[218] *Id.* at 187-88.

[219] 114 N.H. 813, 330 A.2d 448 (1974).

[220] *Id.* at 816, 330 A.2d at 450.

[221] *Id.* at 816, 330 A.2d at 451.

[222] *Id.*

[223] 255 F. Supp. 526 (E.D. Okla. 1966), *aff'd*, 389 F.2d 233 (10th Cir. 1968).

[224] *Id.* at 528.

[225] *Id.*

[226] *Id.* at 529 (court found that insolvency occurred some three months after the transfer).

was from $10,000 to $50,000.[227] From this testimony, the court had no trouble finding that working capital of $5,000 was inadequate.[228]

In each of these cases the nature of each business and its individual operating needs set the range of reasonable capital.[229] If, as in *Steph*, the remaining capital was not in this range, the capital was unreasonably small.[230] Cases such as *Credit Managers* and *Zuk*, however, show that not all failed businesses with meager capital qualify as businesses with "unreasonably small" capital.[231] From this analysis, it can be seen that non-payment for reasons other than inadequate resources may not qualify under section 5 and its progeny. For example, under this analysis a transferor could defeat an unreasonably small capital action if it could show that it had adequate reserves but did not pay the debt due to a bona fide dispute over whether the debt was due.[232] In short, the proof required seems to be that, all other things being equal and the debt being valid, non-payment was the reasonably foreseeable effect of inadequate operating *reserves*, not other commercial defenses to payment.[233] As a result, if the transferor can show a course of trade justifying the amount of reserves retained, or can produce reasonable cash flow pro-

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[227]*Id.* at 532.

[228]Similarly, in *In re* Atlas Foundry Co., 155 F. Supp. 615 (D.N.J. 1957), the court made an explicit finding that although the questioned transfer left the transferor solvent, it left the transferor with "cash capital" of only $25,000, which was insufficient to meet its standard requirement of $200,000 to $300,000 in such cash capital. *See also* Kearny Plumbing Supply Co. v. Gland, 8 N.J. Misc. 789, 151 A. 873 (1930) (transfer made in a month in which net worth dropped from $3868 to a negative $941.19 was made at a time when transferor had unreasonably small capital).

[229]*In re* Process-Manz Press, Inc., 236 F. Supp. 333, 346 (N.D. Ill. 1964), *rev'd on jurisdictional grounds*, 369 F.2d 513 (7th Cir. 1966), *cert. denied sub nom.* Limperis v. A.J. Armstrong Co., Inc., 386 U.S. 957 (1967) (court found evidence of unreasonably small capital from a demonstrated inability to pay debts as they matured after the transfer, and from numerous bank overdrafts); *accord* New York Credit Men's Adjustment Bureau, Inc. v. Adler, 2 Bankr. 752, 756 (S.D.N.Y. 1980). *See also* Fidelity Trust Co. v. Union Nat'l Bank of Pittsburgh, 313 Pa. 467, 169 A. 209 (1933), *cert. denied*, 291 U.S. 680 (1934) (court found transferor solvent, but not sufficiently so to carry on stock speculation business).

[230]*See also* United States v. 58th St. Plaza Theatre, Inc., 287 F. Supp. 475 (S.D.N.Y. 1968) (court found that capital was inadequate if tax liability were to be assessed at full amount claimed; left unanswered whether transferor was bound to consider full amount of liability or only discounted value after probability of success was taken into account).

[231]"But the law does not require that companies be sufficiently well capitalized to withstand any and all setbacks to their business. The requirement is only that they not be left with 'unreasonably small capital' at the time of the conveyance alleged as fraudulent." Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175, 187 (C.D. Cal. 1985).

[232]*See supra* text accompanying notes 197-98.

[233]*Cf.* 11 U.S.C. § 303(h)(1) (1982) (order for relief on involuntary petition not allowed when debts not being generally paid are subject to a bona fide dispute).

jections from the time of the transfer, covering the time period in which the plaintiff's claim arose,[234] it will have shown that, although it had small capital, the amount was not unreasonably so.[235]

3. The Final Requirement: A Direct and Causal Link Between the Transfer and Non-Payment.—The last prerequisite to finding inadequate capital is that the transfer must directly lead to non-payment. Initially excluded by this test are cases where there is an alternate and cheaper manner in which to conduct the business; in short, the transferor's profligacy may be used as a supervening cause.[236] A case in point is *Jacobson v. First State Bank* (In re *Jacobson*).[237] In that case, the court found that alternate ways of conducting the business after the transfer—by renting the land and equipment transferred—would have been cheaper, and presumably would have avoided creditors' non-payment.[238] Accordingly, it found the remaining capital was adequate.[239]

This additional requirement is also necessary because subsequent events may make it inequitable to prefer a creditor over a transferee. Take, for example, the occurrence of an unforeseen and unforeseeable calamity after a transfer. If this calamity would have accounted for non-payment even if adequate reserves had been retained, the presence of this intervening and supervening cause should bar fraudulent transfer liability. Likewise, if a transferor leaves itself with unreasonably small capital, but later builds up capital or assets to a reasonable level,

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[234]For differences in treatment between private party plaintiffs and plaintiffs whose standing derives from the Code, see *supra* text accompanying note 198.

[235]The outside limit within which the parties to the transaction are at risk is limited by the applicable statute of limitations. *See supra* note 198. The UFTA suggests a four year limitation period for transfers involving unreasonably small assets, UFTA, *supra* note 1, § 9; the Code limits the period to one year prior to the date the bankruptcy petition was filed. 11 U.S.C. § 548(a) (1982). The rule under the UFCA is not uniform; some states have statutes of limitations as long as six years, McNellis v. Raymond, 287 F. Supp. 232, 237-38 (N.D.N.Y. 1968), *aff'd in relevant part*, 420 F.2d 51 (2d Cir. 1970), and at least one case has suggested that no statute of limitations under the UFCA may apply against the United States as sovereign. United States v. Gleneagles Investment Co., Inc., 565 F. Supp. 556, 583 (M.D. Pa. 1983), *aff'd sub nom.* United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986). This may prove to be a boon to bankruptcy trustees, *see* 11 U.S.C. § 544(b) (1982) (bankruptcy trustee has standing of any creditor as of the date the petition was filed).

[236]*See* Hunters v. Waite, 44 Va. (3 Gratt.) 26 (1846) (imprudent habits of transferor considered when evaluating transfer).

[237]48 Bankr. 497 (Bankr. D. Minn. 1985).

[238]*Id.* at 501.

[239]It did this by finding that the property transferred was not "necessary to the continued operation of Plaintiff's business." *Id. Cf.* Tarbox v. Zeman (*In re* Zeman), 60 Bankr. 764, 768 (Bankr. N.D. Iowa 1986) (involuntary transfer which forced transferor to cease business established that property was necessary to business, and that its transfer left the transferor with unreasonably small capital).

subsequent creditors should have no ability to challenge the original transfer.[240]

The case law has recognized this common sense notion. Early cases recognized that "losses in trade, or by fire, or by storms" cut off liability to future creditors.[241] More recent cases have added to this list. For example, in *Jenney v. Vining*,[242] a husband and wife had transferred ownership of their house from joint ownership to sole ownership by the wife.[243] Later, one of the husband's business associates challenged this transfer in order to levy execution on the house.[244] The husband had not paid the judgment leading to the levy because, four months after the transfer, he and his business had entered into a new venture, and that venture had failed.[245]

After finding that the transfer left the husband solvent,[246] the equity master found that the new venture was not in contemplation at the time of the conveyance, and was the cause of the demise of the husband's business.[247] In short, although the master, by implication, found that non-payment was reasonably foreseeable given the low level of capital left by the transfer, he also found the new venture was *not* reasonably foreseeable. This subsequent event was thus held to override the level of capital remaining after the transfer.

Similarly, in *Credit Managers Association of Southern California v. Federal Co.*,[248] a management led leveraged buyout failed. An attack was mounted along unreasonably small capital lines. Although the court found that capital was adequate on the basis of cash flows developed at the time of the cash flows,[249] it also inquired into intervening events. In particular, the transferee pointed to two unforeseen events: the loss of a major customer,[250] and a four month labor strike by the Teamsters' union.[251] Both of these events adversely affected an admittedly marginal operation; indeed, the court characterized the strike as a "crippling blow from which [the transferor] never fully recovered."[252] As a consequence,

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[240]The historical antecedent for this proposition is set forth in M. BIGELOW, *supra* note 27, § 3, at 227 n.1; D. MOORE, *supra* note 47, § 10, at 283.

[241]O. BUMP, *supra* note 31, § 262, at 300-01. *See also* M. BIGELOW, *supra* note 27, § 3, at 229.

[242]120 N.H. 377, 415 A.2d 681 (1980).

[243]*Id.* at 378, 415 A.2d at 682.

[244]*Id.*

[245]*Id.*

[246]*Id.*

[247]*Id.* at 379, 415 A.2d at 683.

[248]629 F. Supp. 175 (C.D. Cal. 1985).

[249]*Id.* at 187. *See also supra* text accompanying notes 144 to 146.

[250]*Id.* at 184.

[251]*Id.*

[252]*Id.* at 186.

the court did not allow the ultimate failure of the business to lead, in an "almost tautological manner"[253] to a finding of unreasonably small capital. Rather it viewed these events to be in the nature of supervening causes, excusing or exonerating the transferor. This holding recognizes that businesses fail for all sorts of reasons, and that fraudulent transfer laws are not a panacea for all such failures.[254]

C. Burdens of Proof

Once a transfer has been isolated for the above analysis, practical questions arise: who has the burden of producing evidence on the points set forth above, and who has the burden of persuading the trier of fact of the truth of each point? Under the UFCA, the plaintiff would have each of these burdens.[255] If applied directly to the above analysis, this would require the plaintiff to present evidence and to prove the truth of each of the following: lack of fair consideration or reasonably equivalent value; that the transferor was in business or about to be engaged in business; that non-payment was reasonably foreseeable at the time of the transfer due to the transferor's lack of adequate present and future resources; and that, but for the transfer, the plaintiff's claim would have been paid.

A well-recognized exception, however, permits the court to infer a proscribed financial state once the plaintiff has shown a lack of fair consideration or reasonably equivalent value.[256] The burden then shifts to the transferor, or, more likely, the transferee,[257] to show that the transferor's financial state permitted such a cheap transfer. The underlying premise of this exception derives from the typical state court setting:

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[253]*See* Alces & Dorr, *supra* note 168 at 560.

[254]*See* M. BIGELOW, *supra* note 27, § 3, at 227 n.1.

[255]*See, e.g.*, Bodino v. Barondess (*In re* Good Time Charley's, Inc.), 54 Bankr. 157, 162 (Bankr. D.N.J. 1984) (applying New Jersey law, the court dismissed case because, after showing a lack of fair consideration, trustee "failed to present evidence to establish" unreasonably small capital); T W M Homes Inc. v. Atherwood Realty & Inv. Co., 214 Cal. App. 2d 826, 29 Cal. Rptr. 887 (1963) (California version of section 4 of the UFCA); Holcomb v. Nunes, 132 Cal. App. 2d. 776, 283 P.2d 301 (1955) (California version of section 5 of the UFCA).

[256]Kingdom Uranium Corp. v. Vance, 269 F.2d 104 (10th Cir. 1959) (applying New Mexico law); Tri-Continental Leasing Corp. v. Zimmerman, 485 F. Supp. 495, 499 (N.D. Cal. 1980) (applying California law); Neumeyer v. Crown Funding Corp., 56 Cal. App. 3d 178, 187-89, 128 Cal. Rptr. 366, 371-73 (1976) (citing similar cases from New York, Pennsylvania and Maryland).

[257]In most cases, the transferee will be the primary target, since resort to fraudulent transfer law by its nature presupposes that the transferor/debtor is unable to satisfy its obligations to the creditor/plaintiff. *See, e.g.*, Neumeyer v. Crown Funding Corp., 56 Cal. App. 3d 178, 187-89, 128 Cal. Rptr. 366, 371-73 (1976).

two creditors battling over whether one should be able to retain the benefits of a cheap transfer. Since the transferor is typically not present,[258] or without incentive to defend,[259] the shift makes sense; it forces the recipient of a cheap transfer to justify its retention.

This shift applies, however, only to cases in which the UFCA or the UFTA provide the governing law; it does not apply to cases brought under section 548 of the Code since the assumptions supporting the shift do not apply.[260] The debtor in possession or the trustee[261] is most likely to possess financial information regarding the transferor, and, presumably is in the best position to recreate the transferor's financial state. Moreover, these entities are directly attacking their predecessor's bargain, and thus may be in a better position to control or color the proof regarding it.

This division of proof and the equitable allocation of labor it entails is sound, and should be carried through to the analysis set forth above. A transferor or its favored transferee should be able to better establish whether the transferor was engaged in business. With respect to adequacy of resources and causation, liberal discovery should enable plaintiffs to at least establish a prima facie case.[262] In addition when the burden

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[258]In *Neumeyer*, for example, the transferor had long since disappeared and could not be compelled to attend the trial. 56 Cal. App. 3d at 182, 128 Cal. Rptr. at 368.

[259]*See supra* text accompanying notes 196-97.

[260]Corbin v. Franklin Nat'l Bank (*In re* Franklin Nat'l Bank Securities Litigation), 2 Bankr. 687, 710 (E.D.N.Y. 1979), *aff'd mem.*, 630 F.2d 203 (2d Cir. 1980) (under Act); Jacobson v. First State Bank of Benson (*In re* Jacobson), 48 Bankr. 497, 501 (Bankr. D. Minn. 1985) (burden of proof on debtor in possession as plaintiff); *In re* Tabala, 11 Bankr. 405, 408 (Bankr. S.D.N.Y. 1981); 4 COLLIER ON BANKRUPTCY, *supra* note 79, ¶ 548.10, at 548-123 to 548-124. *Compare* Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175, 183 (C.D. Cal. 1985) (assignee for benefit of creditors empowered to use presumption under state decisional law) *with* Kupetz v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 77 Bankr. 754, 762 (C.D. Cal. 1987) (bankruptcy trustee did not show he met state law conditions for presumption), *aff'd sub. nom.* Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988).

[261]In some jurisdictions, entities other than the debtor in possession or trustee may bring a fraudulent transfer action. Hansen v. Finn (*In re* Curry and Sorensen, Inc.), 57 Bankr. 824, 828-29 & n.3 (Bankr. 9th Cir. 1986); *see generally* Karasik, *Standing to Initiate Adversary Proceedings in a Bankruptcy Case*, 92 COM. L.J. 83 (1987). Because the standing of these parties appears to be derivative to the trustee or the debtor in possession, the burden shift should not apply. *Currey and Sorensen, Inc.*, 57 Bankr. at 828. *See* Kupetz v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 77 Bankr. 754, 762 (C.D. Cal. 1987) (finding insufficient factual basis to justify state law burden shift), *aff'd sub. nom.* Kupetz v. Wolf, 845 F.2d 842 (9th Cir. 1988).

[262]In *In re* Process-Manz Press, Inc., the court found evidence of unreasonably small capital from a demonstrated inability to pay debts as they matured after the transfer, and from numerous bank overdrafts. 236 F. Supp. 333 (N.D. Ill. 1964), *rev'd on jurisdictional grounds*, 369 F.2d. 513 (7th Cir. 1965), *cert. denied sub nom.* Limperis v. A.J.

shift discussed above is available,[263] a plaintiff will also be able to state and make its case by simply showing that the transfer was for less than reasonably equivalent value. This burden shift is also supported by the fact that, under cases such as *Credit Managers*, a transferor or transferee can provide a complete defense by producing reasonable and realistic cash flow projections from the vantage point of the transfer.[264]

V. Conclusion

Although the unreasonably small capital section of the fraudulent transfer laws has not drawn great attention, it has developed a significant body of case law. As shown above, a general theme for future application of the section can be distilled from these precedents. An action will lie under the unreasonably small capital section if a transfer is made for less than reasonably equivalent value, and if: the transferor is engaged in business or a business transaction; non-payment of the plaintiff's claim was reasonably foreseeable at the time of the transfer due to the inadequacy of the transferor's reasonably foreseeable present and future resources; and but for the transfer and the inadequacy of the transferor's resources, the plaintiff's claim would have been paid.

This analysis views the unreasonably small capital section in its historical context; that is, as an auxiliary and adjunct to the section of the fraudulent conveyance law on transfers by insolvents. It also is a tool to distinguish and discredit at least two unwarranted *per se* rules that have developed in the unreasonably small capital jurisprudence.

Given the renewed interest in fraudulent transfers generally, and the likely increased resort to the unreasonably small capital section specifically, the analysis developed in this article can be used to restore part of fraudulent transfer law to its original place. Consistency and "true and plain dealing" could then be restored to an area of the law not necessarily known for those virtues.

Armstrong Co., Inc., 386 U.S. 957 (1967). *See also* New York Credit Men's Adjustment Bureau, Inc. v. Adler, 2 Bankr. 752, 756 (S.D.N.Y. 1980).

[263]*See supra* text accompanying notes 256-57.

[264]Credit Managers Ass'n of S. Cal. v. Federal Co., 629 F. Supp. 175, 184 (C.D. Cal. 1985).

The Rationale of Personal Admissions

ROGER PARK*

Under the personal admissions rule, a party's own statement is admissible in evidence when offered by the opponent.[1] The rule is categorical. Whatever the party has said or written is admissible against that party, so far as the hearsay rule is concerned, whether or not the statement is armed with guarantees of trustworthiness. Admissions are often reliable because they were against interest when made, but they are not required to have been against interest. Hence the admissions rule cannot be supported, in all of its applications, on the theory that a person does not make self-harming statements unless they are true.[2] The Advisory Committee to the Federal Rules of Evidence recognized this point, and after noting that "no guarantee of trustworthiness is required in the case of an admission," stated that "their admissibility in evidence is the result of the adversary system rather than satisfaction of the [reliability-based] conditions of the hearsay rule."[3] Because admissions are not required to be trustworthy, the Committee reasoned, they should not be considered an exception to the hearsay rule, but should be placed in a special category of their own.[4]

Commentators have joined the Advisory Committee in treating the rule receiving personal admissions as *sui generis*, that is, as not being

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[1] *See, e.g.*, FED. R. EVID. 801(d)(2)(A).

[2] *See* FED. R. EVID. 801(d)(2); C. MCCORMICK, MCCORMICK ON EVIDENCE § 262 (E. Cleary 3d. Ed. 1984) [hereinafter cited as MCCORMICK]. McCormick gives the following example: "If a person states that a note is forged, and then later acquires the note and sues upon it, the previous statement will come in against him as an admission, though he had no interest when he made the statement." *Id.*

[3] FED. R. EVID. 801(d)(2) advisory committee's note. The Advisory Committee, following Wigmore, drew a curious conclusion from this reasoning. It decided that admissions could not be classed as an exception to the hearsay rule because, unlike other exceptions, they do not require guarantees of trustworthiness. Therefore, they must be deemed not to be hearsay at all. Following this reasoning, the Advisory Committee created an ungainly category of out-of-court statements (including admissions) which are defined as not being hearsay, though they are offered to prove the truth of the matter asserted. The structure of the Federal Rules would have been simpler if the Committee had defined all out-of-court statements offered to prove the truth of the matter asserted as hearsay, and had placed admissions in the category of exceptions.

[4] *Id.*

based on considerations that normally support hearsay exceptions.[5] One reaches this view by reasoning that: (1) exceptions to the hearsay rule are based upon a trustworthiness rationale; (2) admissions are not required to be trustworthy; (3) therefore, the admissions rule is not a true hearsay exception, and one must look for some rationale for receiving admissions that does not rely at all upon suppositions about their trustworthiness. This essay will argue that this chain of reasoning has two flaws: it assumes too limited a basis for the creation of hearsay exceptions, and it assumes that a rule that is not tailored to eliminate *all* unreliable statements cannot enlist reliability as one of its justifications. First, however, the article will examine the results of the search for a unique rationale for the admissions rule.

This search has attracted the attention of distinguished scholars of evidence and procedure. Their explanations of the rule's rationale give content to the Advisory Committee's brief reference to the "adversary system" as the basis for the admissions rule.

Zachariah Chafee saw the rule as resting "on a deep-rooted human instinct antedating common law rules of Evidence[.] 'Out of their own mouths —.'"[6] He also counseled that "[t]his attitude is easier to grasp when we remember that a trial is not an abstract search for truth, but an attempt to settle a controversy between two persons without physical conflict."[7] The reception of admissions, therefore, need not be justified on grounds of trustworthiness; the significance of an admission is "*inter partes*, like estoppel or *res judicata*, which sometimes make truth irrelevant."[8]

Morgan believed that reception of admissions was a corollary of the adversary system[9] and explained that "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath."[10] McCormick endorsed this view,[11] remarking that "[t]his notion that it does not lie in the opponent's mouth to question the trustworthiness

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[5]*See* authorities cited *infra* notes 6, 9, 10, 11.

[6]Chafee, Book Review, 37 HARV. L. REV. 513, 519 (1924) (reviewing J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923)).

[7]*Id.*

[8]*Id.*

[9]MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1962).

[10]*Id. Cf.* J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048 (Chadbourn rev. 1972).

[11]C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 239 (1954). McCormick limited his acceptance of Morgan's theory to "express admission"—that is, out-of-court statements received as admissions. McCormick classified non-statements received as "admissions" as conduct that circumstantially undermines a party's claim. *Id.*

of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason."[12]

This attitude of "you said it, and you're stuck with it" is most vividly displayed in Lev's article setting forth an estoppel theory of admissions.[13] Lev wrote flatly that admissions were received against a party as judicial punishment for his inconsistency.[14]

These theories may help explain the genesis of the admissions rule. They do not, however, justify retaining the rule. The explanations of Morgan, McCormick and Lev suggest that the statement should be received because the party cannot fairly object. But why should the party be precluded from objecting? The usual prerequisites for the application of estoppel or waiver are not present. The party has not misled the other party into relying upon the statement to his or her detriment—reliance may have occurred, in some cases, but reliance is certainly not one of the requirements of receiving an admission. Nor has the party slept on his rights, engaged in dilatory conduct, or done anything else that impairs the smooth operation of the judicial system.[15] If the rule rests solely upon the desire to punish inconsistency, then the punishment is disproportionate. What the party has done is to make a statement while not under oath, which the party now asks to have excluded on grounds that its inaccuracy may mislead the trier of fact. If we accept the view that admissions are unreliable and that the trier cannot accurately evaluate them, then the statement may cause the trier to reach an inaccurate result—for example, it may cause the trier to convict an innocent person. Yet because the party once made an inaccurate statement while not under oath, the party is prevented from objecting to whatever consequence may flow from the reception of the statement, including being convicted of a crime that the party did not commit.

Chafee's theory[16] takes the focus away from crime and punishment, and places it on the acceptability of verdicts. Because others, including the parties, accept the admissions rule, the judicial system should

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[12]*Id.*

[13]Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. CIN. L. REV. 17 (1957).

[14]*Id.* at 29.

[15]Compare the usual waiver situation, in which a party seeks to resurrect an objection that should have been made earlier. Here it is sometimes appropriate to hold that a party has waived his rights, not because the party "can hardly object" in a moral sense, but because the judicial system must encourage timely objections for its own benefit. For example, judicial economy requires that objections to matters such as personal jurisdiction, venue, and improper service of process must be made before the merits of the case have been reached. *See* FED. R. CIV. P. 12(h)(1).

[16]*See supra* notes 6-8 and accompanying text.

accept it, whether or not it produces accurate verdicts, because it enhances popular acceptance of verdicts. Trials, in Chafee's view, are not searches for truth, but attempts to settle disputes without physical violence. Chafee's point assumes the model of the bipartite dispute in which settlement is more important than an accurate verdict. Yet many cases are not of that nature; rather, they involve the determination of issues that affect many persons who are not parties.[17] Moreover, the moral judgment implied in Chafee's theory is not acceptable even in the classic bipartite case. Fault should not be assigned, much less punishment administered, on the basis of fact-finding believed to be inaccurate. Judicial pursuit of accuracy is the ultimate guarantor of public acceptability of verdicts. Sometimes the pursuit of complete accuracy must be sacrificed to other goals, such as the protection of confidences or the conservation of resources, but it should not be sacrificed to instinct and emotion.[18]

Suppose that one rejects these rationales. What position, then, should one have about the reception of party admissions? There are at least four possibilities: (1) one could maintain that the category of party admissions should no longer be recognized;[19] (2) one could maintain that the category should be recognized, but redefined to reduce the possibility of unreliable verdicts; (3) one could continue to accept the admissions rule in its present form, on grounds that the entire hearsay rule is based on a mistaken theory and that any ex-

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[17]*See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[18]I have assumed that accurate fact-finding should be the primary goal of the rules of evidence and trial procedure, and that speed and economy are the most important secondary goals. For examples of other authors who appear to have made the same assumption, see 1 J. BENTHAM, RATIONAL OF JUDICIAL EVIDENCE 1, 5-6 (1827); Lengbein, *The German Advantage in Civil Procedure*, 52 CHI. L. REV. 822 (1985); Frankel, *The Search For Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). This essay is not the place for a critique of scholars who stress the importance of other goals, such as satisfaction of the parties, providing catharsis, or achieving verdicts that are acceptable to the public. *See generally* Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 COLO. L. REV. 1 (1987); Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978). *Compare* Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985), *with* Allen, *Rationality Mythology, and the "Acceptability of Verdicts" Thesis* 66 B.U.L. REV. 541 (1986). It is sufficient to note that, at least in this context, I align myself with those who would give accuracy of fact-finding a primary place.

[19]*See* Hetland, *Admissions in the Uniform Rules: Are They Necessary?* 46 IOWA L. REV. 307, 322-330 (1961). Hetland argues that because the Uniform Rules liberally admit hearsay that is reliable, the admissions category is no longer necessary. He might reach a different conclusion under a system other than the Uniform Rules.

ception, however arbitrary, will promote justice by putting more facts before the trier; or (4) one could try to find a basis upon which the admissions rule can be justified as supporting accurate fact-finding within the constraints of the judicial system.

The fourth course is the best. The rule receiving personal admissions is a perfectly proper exception to the hearsay rule, justified by the same sorts of considerations that support the other exceptions. In supporting this view, the article will first describe reasons that support exclusion of hearsay, and then seek to show why those reasons do not require the exclusion of personal admissions.[20]

The conventional explanation for the exclusion of hearsay centers on the danger of admitting evidence whose reliability has not been tested. Unlike courtroom witnesses, hearsay declarants have not testified under oath, in the presence of the trier and subject to cross-examination. These courtroom safeguards have the dual effect of encouraging witnesses to be accurate and of exposing defects in their credibility. Cross-examination is especially valuable because of the opportunity it provides to test credibility by exploring weaknesses in a declarant's memory, perception, narrative ability, and sincerity. Under this view, the fundamental flaw of hearsay evidence is that the adversary has not had the opportunity to reveal these weaknesses through cross-examination of the out-of-court declarant.[21]

While academic commentators have tended to focus upon the danger that the untested statement of the out-of-court declarant will be unreliable, lawyers and judges have often supported exclusion of hearsay on an additional basis: that the witness who reports the hearsay statement in court may testify inaccurately.[22] Not only is there a danger of inaccurate reporting, but it is difficult to expose inaccuracy through cross-examination of the witness reporting the statement. As Chancellor

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[20]For a more comprehensive explanation of the reasons for excluding hearsay, see Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55-88 (1987).

[21]*See, e.g.*, G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159-60 (1978); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362 at 7 (3d ed. 1940).

[22]*See, e.g.*, Report of Committee on Administration of Justice on Model Code of Evidence, 19 *Journal of the State Bar of California* 262, 274 (1944) (arguing that danger of misreport of statements is the main reason for excluding hearsay). *See also* Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 436 (1836) (Story, J.) (besides lacking oath and cross-examination, the fault of hearsay is "that it is peculiarly liable to be obtained by fraudulent contrivances"); Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 296 (1813) (Marshall, J.) (speaking of the "frauds which might be practiced" in the absence of the hearsay rule); Englebretson v. Industrial Acc. Comm., 170 Cal. 793, 798 151 P. 421, 423 (1915) (Shaw, J.) (same); Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 56 (1987).

Kent wrote, "A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author."[23] The danger of fabrication is increased by the fact that the in-court witness could, if hearsay were freely admissible, create a fictional declarant who made the crucial statement when no one else was present.

Another concern has frequently been advanced by bar groups that have opposed the liberal admission of hearsay. They have expressed the fear that if hearsay were freely admitted, trial preparation would become more difficult, and the danger of unfair surprise at trial would increase.[24] The attorney may be prepared to impeach or contradict the witness on the stand, but not to do so for declarants whose out-of-court statements come in unexpectedly through the mouth of the witness. Also, surprise can operate in the other direction: the attorney who expected his evidence to be admissible may be surprised by exclusion, and unprepared to offer substitute evidence. The unitary nature of the typical American trial makes surprise a greater danger than in other systems, where adjournments and continuances can mitigate its effect.

Bar groups have also raised the specter of misuse of judicial discretion. Proposals for hearsay reform have stimulated fear of discretion because most advocates of reform would not make hearsay admissible without limit, but would give trial judges discretion to admit or exclude in appropriate cases.[25] The fear of unbridled discretion

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[23]Coleman v. Southwick, 9 Johns 45, 50 (N.Y. 1812). *See also* R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 520 & n.38 (2d ed. 1982).

[24]*See Proposed Rules of Evidence: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, Ser. No. 2 (Supp.), 93d Cong., 1st Sess. 74 (1973) [hereinafter cited as *Proposed Rules of Evidence: House Hearings* (Supp.)] (statement of American College of Trial Lawyers) (asserting that broad admissibility of hearsay will "make it impossible for a trial counsel adequately to prepare the case for trial since he will not and cannot know what evidence he will have to meet until it faces him in the courtroom"); *id.* at 290 (statement of District of Columbia Bar Association) (unfairness may result from surprise and a "novel offer" of hearsay evidence); H.R. Rep. No. 650, 93d Cong., 1st Sess., 5 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7079 (explaining Committee's deletion of residual exceptions on grounds that they would have the effect of "injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial.") The final version of the residual exceptions sought to meet the surprise objection by putting in a requirement that notice be given before trial of intent to offer evidence under the exceptions. *See* FED. R. EVID. 803(24); 804(b)(5).

[25]*See, e.g.*, Younger, *Reflections on the Rule Against Hearsay*, 32 S.C.L. REV.

has been one of the bar's primary reasons for opposing these proposals for broader admission of hearsay.[26]

In criminal cases, the exclusion of hearsay partly rests upon concerns about abuse of governmental power. This concern is reflected in the history of the confrontation clause[27] and, more recently, in the congressional consideration of the question whether prior inconsistent statements should be admissible without limit.[28] In part, the concern reflects a fear that free admission of hearsay would give statement-takers too much power, and encourage coercion and trickery in station-house interrogation.[29]

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281 (1980); Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 803(a) (1969), *reprinted in* 2 J. Bailey, III & O. Trelles, II, The Federal Rules of Evidence: Legislative Histories and Related Documents Doc. 5, 178-79 (1980) [hereinafter Bailey & Trelles].

[26]*See, e.g.*, C. Wright & K. Graham, 21 Federal Practice and Procedure § 5005, at 88 (1977) ("[I]t is now part of the lore that the [Model] Code failed because lawyers objected to the power left in the trial judge. While scholars and appellate court judges may be comfortable with the idea, most practicing lawyers are not 'Big Pots' who can count on the trial judge to be benign in his exercise of discretion."); *Proposed Rules of Evidence: House Hearings* (Supp.), *supra* note 23 (statement of American College of Trial Lawyers opposing broad admissibility of hearsay and condemning increased judicial discretion); *id.* at 91 (statement of Washington State Bar Association opposing proposed residual exceptions on grounds of increased judicial discretion); *id.* at 356 (statement of Colorado Bar Association opposing residual exceptions on grounds that they inject too much uncertainty and discretion into the law of evidence).

[27]*See generally* Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. Fla. L. Rev. 207, 208-15 (1984). *Cf.* California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses.").

[28]The legislative history of Rule 801(d)(1)(A) indicates that concern about fabrication by investigators and systemic criminal justice concerns played as much a role in limiting the use of prior inconsistent statements as did the orthodox concern about the absence of immediate cross-examination of the declarant. *See* Park, *A Subject Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 78-80 (1987).

[29]These concerns were expressed by opponents of the proposed rule, described in the preceding footnote, that would have allowed substantive use of all prior inconsistent statements. *See Proposed Rules of Evidence: House Hearings* (Supp.), *supra* note 23, at 92-93 (statement of Frederick D. McDonald). *See also Federal Rules of Evidence: Hearings before the Committee on the Judiciary* 92d Cong., 2d Sess. 302 [hereinafter *Senate Hearings*] (statement of Herbert Semmel (Washington Council of Lawyers)); *Rules of Evidence: Hearings Before the Special Subcom. on Reform of Federal Criminal Laws of the House Comm. of the Judiciary* 93 Cong., 1st Sess. 252 (oral testimony of Henry J. Friendly). *Cf.* statement of Senator Ervin, *Senate Hearings* at 36 (4 Bailey & Trelles, *supra* note 24, Doc. 13).

These concerns about unreliability, surprise, discretion, and misuse of governmental power help justify both the exclusion of hearsay and the reception of personal admissions. It is not necessary to base the reception of personal admissions upon other grounds, such as the theory that the party is estopped from objecting or that he or she is being punished for misconduct. Several features of the ordinary personal admission make its reception acceptable.

(1) Party admissions are often made under circumstances that provide a guarantee of trustworthiness. Statements that turn out to be useful to opposing parties in litigation are usually against interest when made.[30] The fact that they are not *always* against interest does not require that they be excluded or that the rule be tailored to apply only to statements that are actually against interest. Requiring a determination that admission was actually against interest when made would add an unnecessary complication.[31] As this article will argue later, a flat rule receiving all personal admissions works no real unfairness, and is justified by consideration of convenience.

(2) It is fair to receive an admission because ordinarily the party who made the admission will have the opportunity to put himself or herself on the stand to explain the statement or to deny having made it.[32] The party thus has an adequate substitute for cross-examination of the out-of-court declarant and an adequate opportunity to expose fabrication by the in-court witness. The admissions rule does not *require* that the party be available, but ordinarily he or she will be. In criminal cases, trials *in absentia* are rare, and are limited to situations in which the party is absent because of the party's own misconduct.[33] In civil

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[30]The author knows of no one who has attempted to prove this assertion empirically, but it seems highly likely that most statements that are offered by opponents (and hence are against the declarant's interest at the litigation stage) were against the declarant's interest when made. *Cf.* McCormick, *supra* note 2, at 777 ("Of course, most admissions are actually against interest when made, but there is no such requirement"); Field, Kaplan & Clermont, Civil Procedure 122-23 (5th ed. 1984) ("usually against interest when made, but they need not have been so").

[31]The issue of whether a statement was so far against interest as to provide a guarantee of trustworthiness can be a complicated one. *See* C. McCormick, *supra* note 2, § 279 (describing problems related to determining context and motive and to admission of statements that contain both deserving and self-serving aspects). For a fuller discussion of problems raised by statements containing deserving and self-serving aspects, C. McCormick, Handbook of the Law of Evidence § 257 (1954).

[32]*See* 4 J. Wigmore, Evidence in Trials at Common Law § 1048, at 5 (Chadbourn rev. 1972) ("he now as opponent has the full opportunity to put himself on the stand and explain his former assertion.")

[33]*See, e.g.*, Fed. R. Crim. P. 43 (trial cannot take place in defendant's absence unless the defendant has voluntarily absented himself after the trial has commenced, or unless the defendant is removed for disruption after having been warned).

cases, under majority doctrine, the personal admissions rule does not apply when the declarant is unavailable by reason of death.[34] When the declarant is unavailable for some other reason such as absence from the jurisdiction, making a showing of unavailability a prerequisite to reception would unduly complicate the rule. The party often has some control over his or her own availability, so the question of whether unavailability is genuine could become a topic of collateral litigation. Moreover, the party who is unavailable for reasons other than death frequently can protect his or her right to present testimony, either by giving testimony at a deposition,[35] or by obtaining a continuance until he or she becomes available.

(3) Ordinarily, the party will not be surprised by the admission, because the party will have been present when the admission was made. By questioning the client, the lawyer should be able to learn of the admission and prepare to rebut or explain it. Even the totally fabricated admission should not be a surprise to a diligent lawyer; the lawyer will routinely be entitled to know about purported admissions of the client through discovery, even in a criminal case.[36]

(4) The rule receiving personal admissions raises no problems of judicial discretion. It is clear and categorical.

(5) The concern in criminal cases that reception of out-of-court statements may lead to abuse of governmental power has been met, in the case of admissions, with doctrines other than the hearsay rule. The fifth amendment regulates the conduct of official statement-takers and protects against the reception of evidence created by government coercion.[37] The "universal" notion described by

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[34]Under the Federal Rules of Evidence, the admissions rule does not authorize the reception of a deceased declarant's statement against his successors. *See* C. McCormick, *supra* note 2, § 268. A majority of states appear to have acceded in this feature of the rule. *See* Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 Vill. L. Rev. 1315, 1343-44 (1985) and authorities cited therein.

[35]*See* Fed. R. Civ. P. 32(a)(3) (deposition of unavailable witness, including a party, is admissible unless the absence of the witness was procured by the party); Richmond v. Brooks, 227 F.2d 490, 493 (2d Cir. 1955) (construing Fed. R. Civ. P. 26(d) which is now Fed. R. Civ. P. 32(a)) (party who lives in state other than state of trial may introduce her own deposition at trial; she had not "procured" her absence within the meaning of the rule); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2147 (1970).

[36]Fed. R. Crim. P. 16(a)(1)(A) gives the defendant the right, on discovery, to a copy of any written or recorded statement made by the defendant, and to "the substance of any oral statement [by the defendant] which the government intends to offer in evidence." In civil cases, statements by a party are freely discoverable by the party who made them, without any showing of special need. *See* Fed. R. Civ. P. 26(b)(3).

[37]*See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (accused must be warned

McCormick[38]—the notion that "it does not lie in the opponents' mouth to question the trustworthiness of his own declarations"—is not so universal as to apply unconditionally to criminal cases.

(6) Concerns about the reliability of admissions are reduced by recognizing that an admission has some probative value even if one assumes that it was untrue when made. The trier ought to know that the party had taken different positions at different times, even if there is no special guarantee that the original position was accurate. Of course, when a party testifies, he or she should be impeachable with inconsistent statements like any other witness.[39] Even if the party does not testify, the fact he or she has taken inconsistent positions at different times (one in the prior statement, and another in litigation) has some impeachment value.[40] It throws suspicion upon the way in which the testimony of witnesses was developed and the way in which the party's case was shaped to meet the requirements of a legal claim or defense. Its value for this purpose, even if not enough to justify receiving the evidence when considered alone, should at least be weighed in the balance.

The article has described why admissions are, in the usual case, acceptable as evidence without the necessity for resorting to any ex-

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of right to counsel and to refuse to answer questions); Jackson v. Denno, 378 U.S. 368 (1966) (reception of involuntary confessions is violation of due process). In applying these constitutional safeguards, the courts have not distinguished between admissions that are confessions (statements directly conceding that the defendant committed the crime) and other admissions offered by the prosecution. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 413 (1982).

[38]*See supra* note 12 and accompanying text.

[39]Even without the benefit of a rule receiving party admissions, the party-witness's prior inconsistent statement would be admissible under FED. R. EVID. 801(d)(1)(A) if made under oath at a proceeding. If made under other circumstances, the prior inconsistent statement would still be admissible on the theory that it is not being offered for the truth of the matter asserted; hence, it falls outside the definition of hearsay set forth in FED. R. EVID. 801(c). In the latter case, the opponent would be entitled to a limiting instruction informing the jury that the statement was only admitted for its bearing on credibility and not for the truth of the matter asserted. *See* J. WEINSTEIN & M. BERGER, 1 WEINSTEIN'S EVIDENCE para. 105 [03] (1984); MCCORMICK, *supra* note 2, § 251.

[40]*See* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048 (Chadbourn rev. 1972). In discussing the probative value of admissions, Wigmore said that in addition to the ordinary value of any utterance, admissions had the additional value of showing self-contradiction because the party-opponent, "whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of witnesses put forward to support his pleadings." *Id.* at 4. *Cf.* Strahorn, *A Reconsideration of the Hearsay Rule and Admission: Part II*, 85 U. PA. L. REV. 564, 569-79 (1937) (Admissions are nonhearsay "circumstantial conduct" that are admissible, not for their narrative value, but to show conduct inconsistent with the party's present claim).

planation based upon notions of estoppel or punishment. It would be possible to refine the admissions rule in an attempt to exclude particular statements whose reception is not supported by all of the reasons given. For example, one could provide that an admission should be excluded if the trial judge finds it to be unreliable and if the party, without fault, is not available to demonstrate its unreliability through testimony. But this doctrinal refinement would not be worth a candle. The rule receiving personal admissions, in its present form, is supremely easy to learn and to apply. *Anything* that a party says may be used against him by the opposing party. Making exceptions for the rare case in which receiving an admission might cause unfairness is simply not worth the confusion and additional litigation that would accompany attempts at doctrinal refinement. Perhaps a case can be made for excluding admissions not based upon personal knowledge.[41] In other situations, however, no great unfairness is caused by blanket reception of admissions. Situations in which an admission is both unreliable and unrebuttable because the party is unavailable will rarely arise. In criminal cases, the unavailability of the defendant will prevent the trial from being held at all, unless the defendant has voluntarily decided to be absent.[42] In civil cases tried without a jury, there would be little point to a rule requiring that admissions be screened for reliability. The judge who is capable of weighing reliability for purposes of ruling on admissibility will also be capable of deciding whether to believe testimony that is admissible.[43] In civil jury cases, the jury assesses the

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[41]Admissions have traditionally been considered to be exempt from the requirement of personal knowledge. *See, e.g.*, MCCORMICK, *supra* note 2, § 263; FED. R. EVID. 801(d)(2) advisory committees note. For examples of instances in which this feature of the rule may have worked unfairness, see Mahlandt v. Wild Canid Survival & Research Center, 588 F.2d 626 (8th Cir. 1978), Reed v. McCord, 160 N.Y. 330, 54 N.E. 737 (1899). However, even when the party spoke without personal knowledge, his or her belief that events could have occurred in the fashion described in the admission may be useful to the trier because of the party's general knowledge. In *Reed*, for example, the statement illustrated at least that the declarant, who apparently was familiar with the machine that caused the injury, did not think it improbable that the machine's "dog" had slipped; in *Mahlandt*, the statement indicated that the custodian of an allegedly tame wolf was willing to accept as true the proposition, later denied, that the wolf had bitten a child. *See generally* Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393 (1984).

[42]*See supra* note 32 and accompanying text.

[43]Of course, appellate review would to some extent correct miscalculations by trial judges. Rarely, however, does appellate review result in reversal on evidence points in nonjury cases. In a nonjury case, the judge who erroneously admits hearsay will be upheld if there is other evidence supporting the verdict. *See* MCCORMICK, *supra* note 2, § 60, at 153.

type of evidence that it regularly uses to make important decisions in everyday life. In assessing the reliability of the out-of-court statement, it will have the aid of arguments of counsel and, in many jurisdictions, of the comments of the trial judge. As a last resort, the trial judge can grant a new trial if the jury's undue reliance upon an admission has caused it to return a verdict that is against the weight of the evidence.

In short, doubts about the utility of the hearsay rule in civil cases generally should make one more willing to tolerate an exception which, if it conceivably covers some instances that it should not, at least has the benefit of clarity and ease of administration. If the rule is too broad, it does no great harm.

The rule receiving personal admissions can be justified, without resort to emotion, "instinct," or ideas of punishment, on grounds that admissions are usually reliable, that a substitute for cross-examination is usually present, that dangers of surprise and discretion are reduced, and that concerns about abuse of governmental power have been met by other rules. To say that the admissions rule must be justified on other grounds because these features are not always present is fallacious. If they are usually present, then the need for simplicity, and the absence of any great sacrifice in achieving it, justify giving the rule its present scope.[44]

This essay concludes with two simple points. The first is that it is not necessary to justify a rule of law by reference to a single goal. No one would deny this proposition in the abstract, yet hearsay writers sometimes deny it in practice, discarding a justification completely because it is inadequate standing alone.[45] The admissions rule is justified by a combination of features, which together are stronger than any one standing alone. The second is that it is perfectly proper to give a rule of law square corners, even if by doing so some territory is included which, in a perfect world, should be elsewhere. Rules that

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[44]The subject of this essay applies to personal admissions, not to admissions of an agent offered against the principal. However, many of the same explanations apply to agents' admissions. The party is likely to be aware of them; they are usually, to some degree, against interest; the agent will often be available as a friendly witness to explain or deny them. In any event, it is clear that agency admissions are even less susceptible to explanation by theories of estoppel or punishment than are personal admissions. The notions that a party cannot object to not being able to cross-examine himself or that he should be punished for inconsistency have little or no application to a party who objects to the admission of the statement of an agent.

[45]Even the greatest evidence scholars are susceptible to this temptation. See, for example, Wigmore's attempt to find a single reason for the hearsay rule, 5 J. Wigmore, Evidence in Trials at Common Law § 1362, at 7 (3d ed. 1940), and his disparagement of jurists who offered additional explanations. *Id.* § 1363.

must be applied instantaneously in the courtroom should be simple and rigid. If they cannot be made so without causing unfairness, then we should tolerate discretion instead of seeking doctrinal refinement. Because the personal admissions rule is simple, rigid and fair, neither discretion nor refinement is needed.

Notes

Apportionment of Harm to Causes: Asbestosis and the Smoking Plaintiff

I. Introduction

Asbestos cases are currently being litigated in jurisdictions all across the country.[1] It is estimated that less than two percent of all workers who have been exposed to asbestos have actually filed claims, even though asbestos litigation has been going on for over a decade.[2] Thousands more claims will likely be filed, thanks in part to attorneys who are offering free x-ray screenings to new groups considered to be at risk from possible asbestos exposure.[3] In the past, presumed high risk workers were those who fabricated asbestos or installed it as insulation. Today tire workers and seamen represent a whole new pool of potential claimants.[4] There appears to be no ebb in sight to the tremendous increase in asbestos litigation.

These cases are founded upon various theories of liability and courts are wrestling everyday with new problems unique to the prolonged-exposure nature of asbestosis. Often the plaintiffs bringing these actions also happen to be tobacco smokers. Courts are struggling with and in some cases sidestepping the issue of whether one who smokes is entitled to less than total compensation irrespective of his degree of fault in bringing about his own disability. The Restatement (Second) of Torts suggests that apportionment of harm to causes is an appropriate theory upon which to rely in these cases.[5]

Of course, it is an essential element of any negligence or strict liability cause of action that the defendant's conduct caused some actual damage to the plaintiff.[6] Throughout the common law development of

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[1]Wall Street Journal, Feb. 18, 1987, at 1, col. 6.

[2]Approximately 40,000 claims have been filed out of a potential 2.5 million workers exposed to asbestos. *Id.*

[3]One law firm has set for itself a goal in 1987: screen 75,000 more tire workers for possible lung problems caused by exposure to asbestos. *Id.* (Positive results would, of course, represent potential tort claims. The ethical considerations and societal cost/benefit analysis of these controversial procedures will be left for another Note.).

[4]*Id.*

[5]*See* Restatement (Second) of Torts § 433A (1964).

[6]Green, Rationale of Proximate Cause 133-41 (1927). The requirement that the plaintiff show a causal link between defendant's action and damage done has served two fundamental functions. First, defendants have been protected from making reparations to plaintiffs for harm which they played no part in bringing about. Second, plaintiffs have been prevented from unjust enrichment since they may recover only that which is the result of the defendant's conduct. The goal of tort law is to make the plaintiff whole

tort theory, causation has been a practical obstacle which plaintiffs have been required to overcome in order to recover damages.[7]

A unique problem arose when a defendant argued that the plaintiff himself caused a portion of the harm for which he seeks recovery, and the defendant challenged the plaintiff's demand for damages. The well developed theory of contributory negligence and the more recent com-

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again, i.e., to place him where he would have been had the defendant not wronged him. It is not meant to place him in a better position than he would have been absent defendant's action.

[7]A brief review of the development of causation theory may be beneficial in helping the reader evaluate the focus of this Note. As early negligence theory developed, it became clear that it was not enough that the plaintiff show that the defendant's conduct caused the damage the plaintiff suffered. Courts began to recognize two separate types of causation.

(a) Cause in fact has been defined as that which is a "*necessary* antecedent" to the harm. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 41, at 265. (5th ed. 1984) [Hereinafter PROSSER & KEETON]. The term "embraces all things which have so far contributed to the result that without them it would not have occurred." *Id.*

(b) Proximate cause is said to be that conduct which "has been so significant and important a cause that the defendant should be legally responsible." *Id.* § 42, at 273.

As a result of the theory that defendant's conduct must be a cause in fact of plaintiff's injury, the "but for" rule has developed as a threshold test of causation. "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the conduct is not a cause of the event, if the event would have occurred without it." *Id.* § 41, at 266; *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (not proper to use rule of causation that focuses solely on whether protected first amendment conduct played a substantial part in employer's decision not to rehire).

Because the "but for" test can lead one back to an infinite number of possibilities of causation, (e.g. but for defendant's parents meeting on that moonlit night . . .) this test alone is never enough though it is generally required. Once "but for" causation has been shown, the fact-finder will then look to see whether proximate causation is also present and thereby determine whether liability will attach. PROSSER & KEETON, *supra* § 41, at 266.

A different problem arises when two or more causes combine to bring about harm to the plaintiff. For example, if A sets a fire and it combines with a fire set by B to burn down C's house, the "but for" test fails. Either fire alone would have been enough to destroy C's house and each defendant could claim his conduct was not the cause of C's harm because C would have lost his house without his conduct. Both defendants could thereby escape liability though it seems clear both are culpable. Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920); Seckerson v. Sinclair, 24 N.D. 625, 140 N.W. 239 (1913).

As a result, the "substantial factor" test has evolved; the defendant will be held liable if his conduct was a substantial factor in bringing about plaintiff's harm. Whether defendant's conduct was a substantial factor is a question left for the jury to decide.

Some have argued that the test is not appropriate for a jury since the phrase "substantial factor" is essentially undefinable. HART AND HONORE, CAUSATION IN THE LAW, 263-66 (1959). Others counter that such a liability has not been imposed upon the use of the term "reasonable" in defining standards of conduct although it is similarly inexact. *See* GREEN, *supra* note 6, at 144-70; PROSSER & KEETON, *supra* § 41, at 266.

parative fault laws have guided courts in many of these types of cases.[8] Fault on the part of the plaintiff should not be a necessary antecedent to diminution of damage awards. Apportionment has been found to be appropriate in various types of cases. These are cases where sufficient evidence existed upon which a jury could reasonably apportion harm to two or more distinct causes. These cases include those involving successive injuries and pre-existing conditions. The underlying rationale of this group of cases is that a defendant should compensate a plaintiff only to the extent necessary to return him to the position he would have occupied had the defendant not acted. This same reasoning can be applied to apportionment when it arises in a typical asbestosis case in which the plaintiff is a tobacco smoker.

II. Asbestosis and Smoking

Once it has been shown that the defendant did cause the plaintiff some harm, there may still be an unresolved issue as to how much of the total harm is attributable to the defendant. Section 433A of the Restatement (Second) of Torts provides:

> (1) Damages for harm to be apportioned among two or more causes where

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[8]Contributory negligence is conduct on the part of the plaintiff which contributes as a legal cause to the harm he has suffered and which falls below the standard of due care which he must afford himself. Smith v. Smith, 19 Mass. 621, 13 Am. De. 464 (1824). Notwithstanding the defendant's breach of duty of due care toward the plaintiff, the plaintiff may not recover since the plaintiff is also at fault. One of the many reasons often cited for the growth of this doctrine is that the courts historically have perceived as unsatisfactory any attempt to apportion damages from a single harm between two or more parties. *See* Lowndes, *Contributory Negligence*, 22 Geo. L.J. 674, 683-84 (1934).

Relatively recent developments in tort law have evidenced the courts' general willingness to allow attempts at apportionment. The result of this reversal of theory has been the adoption of comparative negligence laws. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The court adopted a "pure" form of the doctrine where the plaintiff's damages are simply reduced by the percentage of fault which can be attributed to him. "Modified" contributory negligence allows a negligent plaintiff to recover only to the extent that his fault does not exceed fifty percent of the total. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). The previous reluctance of the courts to accept comparative fault laws and the corresponding apportionment was based partly on "a marked distrust of the bias and general unreliability of the jury which would be expected to make [a decision based on its finding of causation]". Prosser & Keaton, *supra* note 7, at 470. The widespread acceptance of comparative fault laws today is indicative of a retreat from that distrust of the capabilities of juries.

One writer, in advocating the rationale of contributory negligence nearly a century ago, nevertheless noted that the all or nothing approach was not appropriate when "the impossibility of apportioning the damage between the parties does not exist." C.F. Beach, A Treatise of the Law of Contributory Negligence § 12, at 13 (3d ed. 1899).

(a) there are distinct harms, or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.[9]

One court, quoting Prosser, noted, " 'Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made.' "[10]

The possible application of section 433A to asbestosis cases depends largely on the ability of the medical profession to identify distinct pulmonary harms and their causes. The experts base much of their testimony on examination of x-rays of the plaintiff's lungs.[11] Such examinations often reveal more than one type of injury. The x-ray may show several different symptoms, some of which are typical of asbestos related problems, while others may be more commonly associated with tobacco smoking.[12] These separate instrumentalities may manifest themselves in various and distinct ways in the lungs. The injuries in turn can act separately or in combination to bring about a general "disability" in the plaintiff.[13]

Medical experts commonly describe a patient's pulmonary problems as either a *pulmonary impairment* or a *pulmonary disability*. The initial manifestation of harm due to the inhalation of asbestos fibers falls within the general category of "pulmonary impairment."[14] In *Martin v. Johns-Manville Corp.*,[15] an asbestosis case in which the court applied apportionment, the plaintiff was found to be suffering from various forms of pulmonary impairment. These are disturbances of lung function or structure due to disease.[16] Some pulmonary impairment diseases, whether asbestos related or not, may be asymptomatic and present in the lungs for long periods of time prior to detection.[17] Examples of

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[9]RESTATEMENT (SECOND) OF TORTS § 433A(1) (1964).

[10]Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 57, 502 A.2d 1264, 1270 (1985) (quoting PROSSER & KEETON, *supra* note 7, § 52, at 345).

[11]*Id.* at 52-55, 502 A.2d at 1267-69.

[12]*Id.*

[13]*Id.*

[14]LAWYERS' MEDICAL CYCLOPEDIA OF INJURIES AND ALLIED SPECIALTIES § 33.27b (Charles J. Frankel, M.D., LL.B. ed. Revised Volume 5 Part A 1983) [hereinafter LAWYERS' MEDICAL CYCLOPEDIA] (The term "pulmonary insufficiency" is an inexact term sometimes used to describe the inability of the lungs to adequately perform one of their many functions. At least one author has recommended that physicians dispose of the term and instead use the more descriptive "pulmonary impairment." *Id.*).

[15]349 Pa. Super. 46, 502 A.2d 1264 (1985).

[16]LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, at § 33.61 (Supp. 1984).

[17]*Id.*

apparent symptoms of pulmonary impairment include shortness of breath, chronic cough, expectoration, chest pain, and expectoration of blood.[18] A pulmonary disability occurs when the pulmonary impairment results in an inability to function at a specified level of activity,[19] as occurred in the *Martin* case.[20]

Because there are several possible pulmonary harms, an asbestos claimant will attempt to define his disability as broadly as possible in an attempt to assess the total damages to the defendant. On the other hand, the defendant should try to define the plaintiff's disability as precisely as possible. In so doing he can attempt to focus the court's attention on the specific harm caused by his product. This is not always an easy task however, as the cases[21] and the *Lawyers' Medical Cyclopedia of Injuries and Allied Specialties* indicate:

> The precise definition of disability will vary greatly from one situation to another and must be clearly specified, for example, as the degree of impairment resulting in disability for a specific job or for any job in a specific industry. [For example], definitions of disability under workman's compensation laws vary from state to state and are not always based on medically determinable impairment.[22]

In asbestos litigation, either subsection (1)(a) or (1)(b) of section 433A may become an issue when the one who claims disability due to the inhalation of asbestos fibers happens to be a tobacco smoker. Generally, when one seeks to recover from a manufacturer of asbestos, his action rests on the claim that he has been "disabled" as a result of asbestosis. A defendant may raise either of two defenses with respect to section 433A. First, there may be two separate injuries in the lungs, either of which may cause the patient some problems in his daily functions.[23] Second, the plaintiff may be seeking to recover for his overall disability to which separate causes, such as asbestos fibers and tobacco smoke, have contributed to some degree.[24] In the former case subsection (1)(a) applies; in the latter case subsection (1)(b) applies.

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[18]*Id.*

[19]*Id.*

[20]*Martin*, 349 Pa. Super. at 49, 502 A.2d at 1266.

[21]*See generally* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973); Brisboy v. Fibreboard Paper Products Corp., 148 Mich. App. 298, 384 N.W.2d 39 (1985); Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985).

[22]LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, § 33.27(b).

[23]*See, e.g.*, Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985).

[24]*Id.*

Asbestosis was described in the *Martin* case as primarily a "restrictive" lung disease; one in which the lungs are unable to fill to capacity.[25] It is analogous to trying to blow up a balloon in a milk bottle; once the balloon is filled up so far it can expand no further due to the constraints of the bottle.[26]

If the plaintiff who is suffering from asbestosis also smokes cigarettes, it is likely that other, dissimilar diseases will be diagnosed in his lungs. Examples of diseases which are closely associated with smoking and which may be present in the plaintiff's lungs include bronchitis, chronic bronchitis, and pulmonary emphysema. *Bronchitis* is "an inflammation of the lining of the bronchial tubes (bronchi) which connect the windpipe to the lungs . . . the air flow to and from the lungs becomes labored and a heavy mucus or phlegm is coughed up . . . [if] this coughing and spitting continue for months and return each year, [chronic bronchitis is indicated]."[27] *Chronic bronchitis* is "almost always associated with heavy cigarette smoking"[28] and is an obstructive lung disease,[29] one in which the airway passages in the lungs are blocked and air flow through them is hampered. The bronchial tubes, once partially blocked, become a breeding place for infections.[30] *Pulmonary emphysema*, a disease from which the plaintiff in *Martin* suffered, is a disease in which the lung tissue undergoes progressive obstruction.[31] "The lungs become hyperinflated and certain areas may become quite tense and balloon-like, displacing and crowding relatively normal and functional lung tissue so that it becomes compressed and useless."[32]

Given the number of possible pulmonary problems, where evidence exists that the plaintiff suffers from more than one type of disease it is, at the very least, likely that asbestos is the cause of something less than one hundred percent of his total disability. This is where the concept of apportionment becomes relevant.

III. Analogous Applications of the Apportionment Doctrine

There are cases illustrating the validity of the proposition that exact, precise percentages need not be assigned to respective causes in order for apportionment to be appropriate. There needs to be merely "a reasonable basis for determining the contribution of each cause

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[25] *Id.* at 52, 502 A.2d at 1267.

[26] *Id.*

[27] Lawyers' Medical Cyclopedia, *supra* note 14, § 33.27b, at 46.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 47.

[31] *Id.* § 33.44a, at 70.

[32] *Id.*

. . . ."[33] Note that, in general, no particular degree of mathematical certainty is required to award damages so long as the amount awarded is supported by the evidence and is not based upon mere conjecture or speculation.[34] This general proposition is evident in other types of apportionment cases, including successive injury cases, and pre-existing condition cases.

A. Successive Injuries

Where a plaintiff is injured by the successive, not concurrent, negligence of two parties, the second tortfeasor is not held responsible for the entire damage.[35] Rather he will be held liable only for the damage that he caused. On the other hand, the original wrongdoer may be held liable for the entire damage if it is found that his negligence was a substantial factor in bringing about the injury directly precipitated by the second wrongdoer.[36]

In *Hughes v. Great American Indemnity Co.*,[37] the plaintiff was involved in a collision with another automobile. Three minutes later a second automobile struck his disabled vehicle while he was still inside. The plaintiff attempted to recover all of his damages from the insurer of the second automobile. He claimed that negligent drivers of both vehicles were joint tortfeasors and as such were jointly and severally liable for the entire injury.[38] The court held that the rule of recovery *in solido*[39] did not apply.[40] The evidence showed that the driver of the second car "caused . . . new injuries or aggravation of those already inflicted."[41] Consequently, the defendant was legally responsible only for those new or aggravated injuries.[42] This was true notwithstanding the difficulty in dividing the damages.

The plaintiff argued that "it would be impossible under circumstances such as those prevailing in this case to make proof which would segregate the injuries attributable to the separate blows."[43] The court found this

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[33]RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (1964).

[34]Whiteco Properties, Inc. v. Thielbar, 467 N.E.2d 433, 438 (Ind. Ct. App. 1984).

[35]Hughes v. Great American Indem. Co., 236 F.2d 71, 74 (5th Cir. 1956).

[36]PROSSER & KEETON, *supra* note 7, § 52, at 352.

[37]236 F.2d 71 (5th Cir. 1956).

[38]*Id.* at 72.

[39]In the civil law, an obligation *in solido* is one in which each of the several obligors is liable for the whole; that is, it is joint and several. BLACK'S LAW DICTIONARY 716 (5th ed. 1979).

[40]Hughes v. Great American Indem. Co., 236 F.2d 71, 74 (5th Cir. 1956).

[41]*Id.*

[42]*Id.* at 75.

[43]*Id.*

reasoning to be meritless. Relying on reasoning articulated by the United States Supreme Court,[44] the court held:

> Even if this were so, the difficulty of making proof would not change the principle of law involved. But we do not think that this is true. Damages do not have to be established with mathematical certainty so long as there is evidence that damages did probably ensue from the second collision and so long as a reasonable basis is established for recovery of those damages.[45]

The Supreme Court decision relied on in *Hughes* contained an illustration worthy of note. "Surveyors can measure an acre. But measuring negligence is different. . . . [It] call[s] for the exercise of common sense and sound judgment under the circumstances of particular cases. . . . Fact finding does not require mathematical certainty."[46] Although section 433A did not apply directly because neither case involved the issue of apportionment, the courts nevertheless have articulated a sound rule that is particularly appropriate to negligence and causation questions, both of which are left to the finder of fact.

These successive injury cases are analogous to certain types of asbestosis cases. If a plaintiff has smoked for a time prior to being exposed to asbestos fibers, he has almost certainly suffered some harm, even though it may not yet be manifested by noticeably disabling him. When he then inhales asbestos fibers and later, perhaps years later, is disabled by lung disease, the situation is similar to successive accidents. The plaintiff already suffered from some injury and the defendant should not be required to pay damages calculated to make the plaintiff "whole" again. He was not "whole" when he first came in contact with the defendant's product.

Apportionment was found to be proper by the Hawaii Supreme Court in *Bachran v. Morishige*,[47] a case factually similar to *Hughes*, except that the two accidents were separated by two years. The plaintiff continued to suffer during those two years and was disabled when the second accident occurred.[48] The court found that the jury could reasonably have determined the total harm being suffered by the plaintiff was not the proximate result of the later accident.[49] It then applied the

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[44]Schulz v. Pennsylvania R.R. Co., 350 U.S. 523 (1956). In *Schulz*, the plaintiff's decedent had disappeared while working for the defendant railroad and was later found drowned. Without strong evidence either way, the jury was allowed to decide the question of whether the death had resulted from the defendant railroad's negligence.

[45]*Hughes*, 236 F.2d at 75.

[46]*Schulz*, 350 U.S. at 525-26 (citation omitted).

[47]52 Haw. 61, 469 P.2d 808 (1970).

[48]*Id.* at 66, 469 P.2d at 812.

[49]*Id.* at 66, 469 P.2d at 811.

rule that the jury could make a rough apportionment and, if the jury found that to be an impossible task, then it could divide the total damages equally between the two accidents.[50] Furthermore, the court held that medical experts should be allowed to testify "most freely"[51] on the issue of apportionment because the jury is given wide latitude in determining the issue. Also, as testimony is given on apportionment, the expert witnesses should not be "limited or restricted by labels such as 'certainty,' 'reasonable medical certainty,' 'probability,' 'possibility,' etc."[52] If a medical expert cannot testify positively as to causation or contribution by causes, the jury will not be precluded from coming to a determination based on all the available facts.[53] This rule is founded on the undisputed principle that the fact-finder, not the expert witness, is the final arbiter of the question of causation.[54]

Successive injury cases can be analyzed in light of section 433A, which states that damages are to be apportioned where there are two distinct harms. In these cases the plaintiff was actually harmed twice, and absent apportionment, the defendant who was unlucky enough to have caused the second injury would pay more, perhaps much more, than the amount necessary to compensate the plaintiff for the harm actually caused by the defendant.

B. Pre-existing Conditions

The majority of cases in which apportionment has been advocated have arisen when an employee has sued his employer for damages suffered while on the job. Whether to apportion damages is a relevant issue if the employee's work-related injury aggravates a pre-existing physical condition. Courts usually construe workers' compensation statutes to reflect the legislatures' thoughts on when and how apportionment should

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[50]*Id.* at 68, 469 P.2d at 812.

[51]*Id.*

[52]*Id.*

[53]The court stated:

> When causation of the injury is a medical issue, as it is here, "[the] matter does not turn on the use of a particular form of words by the physicians in giving their testimony," since it is for the trier of facts, not the medical witnesses, to make a legal determination of the question of causation. Hence, the failure of a medical witness to testify positively as to what was the cause of the injury, or his statement that the accident "might" be or "probably" was the cause of the injury, is merely a circumstance to be taken into consideration by the trier of facts.

Id. at 67-68, 469 P.2d at 812 (quoting Dzurik v. Tamura, 44 Haw. 327, 330, 359 P.2d 164, 165-66 (1960)).

[54]*Id.* at 66-68, 469 P.2d at 811-13.

be applied.[55] The majority of the statutes contain a provision that requires a reduction in the amount of the plaintiff's recovery if it is shown that the plaintiff's disability is the result of aggravation of a pre-existing condition.

An Indiana case allowed the plaintiff full recovery for her injuries sustained while lifting powder kegs in the course of her employment.[56] The Industrial Board of Indiana found that the plaintiff's disability was due seventy percent to a pre-existing condition and thirty percent to her work related injury.[57] Nevertheless, the court held that when the plaintiff has a non-disabling defect prior to the work-related injury, no finding as to the relative contribution of each cause is appropriate.[58] Therefore, if the plaintiff has a pre-existing condition that has not yet manifested itself by physically disabling him, the condition may not reduce his award even if it was a ninety-nine percent contributing cause of his injury.

This theory may seem consistent with the classic law school metaphor: the "thin skull" doctrine.[59] The result is that often an employer takes his employee as he finds him;[60] however, this may not be appropriate in every case, especially when applied to plaintiffs who smoke. Generally the "thin skull" cases involved involuntarily weakened physical conditions. On the other hand, one who smokes has voluntarily placed himself

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[55]*See, e.g.*, Goodman v. Olin Matheison Chem. Corp., 174 Ind. App. 396, 367 N.E.2d 1140 (1977), where the court construed a typical statute which provides as follows:

> If an employee has sustained a permanent injury either in another employment, or from other cause or causes than the employment in which he received a subsequent permanent injury by accident, . . . he shall be entitled to compensation for the subsequent permanent injury in the same amount as if the previous injury had not occurred: Provided, however, that if the permanent injury for which compensation is claimed, results only in the aggravation or increase of a previously sustained permanent injury or physical condition, regardless of the source or cause of such previously sustained injury or physical condition, the board shall determine the extent of the previously sustained permanent injury or physical condition, as well as the extent of the aggravation or increase resulting from the subsequent permanent injury, and shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury. Provided further, however, that amputation of any part of the body or loss of any or all of the vision of one or both eyes shall be considered as a permanent injury or physical condition.

IND. CODE § 22-3-3-12 (1982).

[56]Goodman v. Olin Matheison Chem. Corp., 174 Ind. App. 396, 367 N.E.2d 1140 (1977). *But see infra* text accompanying notes 126-32.

[57]174 Ind. App. at 400, 367 N.E.2d at 1143.

[58]*Id.* at 401-02, 367 N.E.2d at 1143.

[59]For example, one who negligently strikes another and thereby causes severe injury is responsible for the entire injury even though his act would have resulted in no injury to one who was of average health and in a non-weakened condition.

[60]*Goodman*, 174 Ind. App. at 405, 367 N.E.2d at 1146.

in a weakened physical condition. Furthermore, smoking tobacco will invariably lead to some disability even without some other contributing agent. The disability may be slight, in the form of a persistent cough, or severe, in the form of lung cancer; or the disability may take the form of anything between these two extremes. But a disability in whatever form is still a disability, and, unlike the "thin-skull" cases, the plaintiff has brought about his own weakened physical condition.

A California court has recognized the importance of this distinction.[61] Though not all aggravation cases require apportionment, it is appropriate "in those cases in which part of the disability would have resulted, in the absence of the industrial injury, from the 'normal progress' of the pre-existing condition."[62] One who smokes, at least in today's enlightened times, knows or reasonably should know that he risks almost certain pulmonary injury or disability.[63] Many courts have thus found that

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[61]Amico v. Workmen's Compensation Appeals Bd., 43 Cal. App. 3d 592, 117 Cal. Rptr. 831 (1974).

[62]*Id.* at 599, 117 Cal. Rptr. at 835 (quoting Ballard v. Workmen's Compensation Appeals Bd., 3 Cal. 3d 832, 837, 478 P.2d 937, 940, 92 Cal. Rptr. 1, 4 (1971)).

[63]The reader will note that all those who smoke are constantly reminded of the dangerousness of the habit by the various Surgeon General's warnings which appear on all cigarette packaging and advertising. As further evidence of the likelihood that injury will follow cigarette smoking, see the following table:

CIGARETTE SMOKING AND DEATH FROM LUNG CANCER

Current number of cigarettes per day	Age 35-54	55-69	70-84
	Lung cancer death rates per 100,000 persons-years		
Never smoked regularly	6	19	25
1- 9	38	68	134
10-19	24	168	243
20-39	58	264	446
40+	47	334	754
	Mortality differences		
Never smoked regularly	0	0	0
1- 9	32	49	109
10-19	18	149	218
20-39	52	245	421
40+	41	315	729
	Mortality rates		
Never smoked regularly	1.00	1.00	1.00
1- 9	6.17	3.53	5.32
10-19	3.90	8.77	9.62
20-39	9.37	13.82	17.52
40+	7.67	17.47	29.84

Lung Cancer. Age-standardized death rates, mortality differences, and mortality ratios

disability cases involving aggravation of a pre-existing condition are appropriate for the fact-finder to consider in determining relative causation.[64]

An Arkansas case, *Jenkins v. Halstead Industries*,[65] dealt with apportionment as it related to smoking cigarettes. The plaintiff was fifty-three years old and had smoked cigarettes for approximately twenty-five years.[66] In 1970 he started working as an inspector where he was exposed every day to fumes coming from a casting furnace.[67] He soon began having breathing difficulties.[68] After receiving medical treatment for lung problems in 1975, he worked as a packer for approximately one year and then as a rubber extruder operator where he was exposed to talc, a dry powdered chemical.[69] He continued in that position until he quit working due to his physical condition, contending that the talc caused his pulmonary problems.[70] It was undisputed that the plaintiff suffered from a chronic destructive pulmonary disease, emphysema, and that this ailment caused him to be totally disabled.[71] Medical testimony was offered to show that the talc aggravated the plaintiff's pre-existing lung disease and the Workmen's Compensation Commission found that eight percent of his impairment was attributable to the work place.[72]

The court upheld the finding, apportioned damages accordingly, and found "this is a case wherein an occupational disease was aggravated by another disease or infirmity, not itself compensable, and that apportionment was proper."[73] The court went on to state that it is irrelevant that the plaintiff's pre-existing disease was not an independently producing disability because that is not a prerequisite to applying apportionment principles.[74]

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for men with history of only cigarette smoking who were currently smoking cigarettes at enrollment by current number of cigarettes smoked per day and age at start of study. Death rates for men who never smoked regularly are shown for comparison. LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, table 28.

[64]Baranek v. Reese, 299 F.2d 784 (7th Cir. 1962); Irving v. Bullock, 549 P.2d 1184 (Alaska 1976); Jenkins v. Halstead Industries, 17 Ark. App. 197, 706 S.W.2d 191 (1986); Kellogg v. Worker's Compensation Appeals Bd., 26 Cal. 3d 450, 161 Cal. Rptr. 783, 605 P.2d 422 (1980); Richman v. City of Berkley (Dept. of Public Works), 84 Mich. App. 258, 269 N.W.2d 555 (1978).

[65]17 Ark. App. 197, 706 S.W.2d 191 (1986).

[66]*Id.* at 198, 706 S.W.2d at 192.

[67]*Id.* at 199, 706 S.W.2d at 192.

[68]*Id.*

[69]*Id.*

[70]*Id.*

[71]*Id.*

[72]*Id.* at 200, 706 S.W.2d at 192.

[73]*Id.* at 200, 706 S.W.2d at 193.

[74]*Id.* at 201, 706 S.W.2d at 193.

In *Jenkins*, the court seemed to recognize that the issue is strictly one of causation. No finding of prior disability is necessary when the impairment itself is a contributing factor to the plaintiff's later disability. Other courts have applied this reasoning and have given great latitude to the fact-finder in determining whether a disability is capable of being apportioned.[75] This deference to the fact-finder on the issue of apportionment is made apparent by examining jury instructions that have been upheld in aggravation cases.[76] An example from a Supreme Court of Alaska decision is instructive:

> A person who has a condition or disability at the time of the injury is not entitled to recover damages therefor. However, he is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.
>
> This is true even if the person's condition or disability made him more susceptible to the possibility of ill effects that [sic] a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.
>
> Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.[77]

These aggravation cases demonstrate the long-held judicial belief that causation is a question for the jury, once sufficient evidence has been introduced such that reasonable jurors could differ on the issue. This has been held true even where definite proof has been lacking as to each agent's relative contribution and where the jury must estimate the

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[75]*See, e.g.*, Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985); Richman v. City of Berkley (Dept. of Public Works), 84 Mich. App. 258, 269 N.W.2d 555 (1978).

[76]One example of such a jury instruction states:

> You should consider . . . any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of the plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

Gideon, 261 F.2d at 1139 n.24.

[77]Irving v. Bullock, 549 P.2d 1184, 1187 n.4. (Alaska 1976); *see also* J. Doolin's vigorous dissent, in part, in Cantrell v. Henthorn, 624 P.2d 1056, 1060 (Okla. 1981).

relevant percentages.[78] Courts realize the importance of taking into account a plaintiff's contribution to his own harm, even in cases where it is difficult to determine what proportion of his total harm was a result of his own action.[79]

Further evidence of the propriety of such a conclusion are the comparative fault laws currently effecting major changes in tort liability.[80] These laws are quickly eliminating the perceived unfairness of the all-or-nothing approach of contributory negligence.[81] The new laws dictate that a defendant will not be made to pay for all of the plaintiff's injury if the plaintiff was also at fault. Rough approximations are common in these cases and are no less appropriate when the focus is only the issue of causation. In these cases, one is again reminded of the Restatement which says that damages are to be apportioned if there is a reasonable basis for determining the contribution of each cause to a single harm.[82] There too, the focus is on causation, and the rationale is that a defendant should not be made to pay more than the amount necessary to compensate the plaintiff for the defendant's action.

IV. Apportionment in Asbestosis Cases

A. The Need for Apportionment

To date, apportionment has been allowed in few asbestos cases.[83] Generally, the courts have not found the requisite "reasonable basis for determining the contribution of each cause to a single harm."[84] Instead, some courts rely on contributory negligence and comparative fault laws and in doing so find that smoking cigarettes is not negligent.[85] The idea that negligence on the part of the plaintiff is a necessary prerequisite to a reduction in damages ignores the important issue of causation. No matter how negligent the defendant was, he may still challenge the assertion that he caused the total harm from which the plaintiff suffers. Courts often ignore this premise upon which section 433A is based.

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[78]Stine v. McShane, 55 N.D. 745, 203 Mo. App. 413 (1920); Hill v. Chappel Bros. of Mont., 93 Mont. 92, 18 P.2d 1106 (1933).

[79]*Id.*

[80]*See, e.g.*, *supra* note 8.

[81]*Id.*

[82]Restatement (Second) of Torts § 433A(1)(b) (1964).

[83]*See, e.g.*, Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985).

[84]Restatement (Second) of Torts § 433A(1)(b) (1964).

[85]*See, e.g.*, Brisboy v. Fibreboard Paper Prods. Corp., 148 Mich. App. 298, 384 N.W.2d 39 (1985); *cf.* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1096-1100 (5th Cir. 1973) (discussing contributory negligence and assumption of risk).

In one case, *Brisboy v. Fibreboard Paper Products Corp.*,[86] an asbestos worker, Charles Rand, died of adenocarcinoma.[87] He was a heavy cigarette smoker for thirty years and an asbestos insulator for twenty-six years.[88] Evidence at the trial consisted of conflicting medical testimony.[89] Rand's expert witness testified that Rand's lung cancer was caused by asbestosis; at the same time the witness admitted that the plaintiff's cigarette smoking played a minor contributing role in the cancer's development.[90] The defendant's expert testified that Rand showed no evidence of pulmonary asbestosis and his cancer was caused solely by cigarette smoking.[91] The doctor who performed the autopsy stated that cigarette smoking can be related to lung cancer, but he felt that a stronger link exists between asbestosis and cancer than between smoking and cancer.[92]

The jury concluded that Rand's death was caused by the combined effect of asbestos fibers and cigarette smoke. The plaintiff's smoking was deemed to have been 55 percent responsible for his injuries.[93] The appellate court stated that while Rand could be said to have been negligent in assuming that risk of contracting cigarette-related lung cancer, this combined-effect lung cancer was somehow an unknown and unforeseen risk.[94]

Although this decision focused on contributory negligence, it is likely the court would apply the same rationale for comparative fault purposes.

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[86]148 Mich. App. 298, 384 N.W.2d 39 (1985).

[87]*Id.* at 300, 384 N.W.2d at 40.

[88]*Id.*

[89]*Id.* at 300-01, 384 N.W.2d at 40.

[90]*Id.* at 301, 384 N.W.2d at 40.

[91]*Id.*

[92]*Id.*

[93]*Id.* at 302, 384 N.W.2d at 41.

[94]The court used this language in deciding the issue:

> While we again find the issue to be a close one, we believe that the trial court properly refused to find Mr. Rand to have been contributorily negligent. Although Mr. Rand would have been contributorily negligent with regard to lung cancer caused solely by his cigarette smoking, there was no indication on the record that he was aware or should have been aware of the risk of cigarette smoking as it related to asbestos and asbestos-related lung cancer. Thus, decedent cannot be said to have been negligent with regard to the specific hazard which he actually encountered. The fact that the risk negligently undertaken by the decedent was very similar to that actually encountered does not alter this analysis . . . . In this case, Mr. Rand could be found to have negligently assumed the risk of contracting cigarette-related lung cancer but not to have assumed the risk of developing unknown and unforeseen diseases which might have been related to his smoking. We, therefore, find that the trial court properly declined to apply comparative negligence to reduce plaintiff's damages.

Id. at 307, 384 N.W.2d at 43 (citations omitted).

If the plaintiff was not "at fault," then no reduction in damages would follow; but lung cancer would seem to fall within the realm of foreseeable consequences that the plaintiff risked when he chose to smoke. There is "quite universal agreement that what is required to be foreseeable is only the 'general character' or 'general type' of the event or the harm and not its precise nature, details, or above all manner of occurrence."[95]

On appeal, the Michigan Supreme Court followed this latter analysis and reinstated the jury verdict, holding that the trial court had relied on an overly narrow definition of the risk of harm in refusing to accept the jury's verdict.[96] A smoker assumes the risk of developing lung cancer without regard to whether that risk is increased by extraneous factors.[97] Therefore, the jury's balancing of the risks was reasonable.[98] Additionally, the court rejected the argument that no rational basis existed for apportionment.[99] The court recognized that this is just the sort of judgment juries are frequently asked to make.

The notion that only the general character of the harm need be foreseeable is well articulated in a 1967 decision by the Supreme Court of Mississippi.[100] "[An act] resulting in injury is the proximate cause thereof, and creates liability therefore, *when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom.*"[101] Comparing that language to the facts in

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[95]PROSSER & KEETON, *supra* note 7, § 43, at 299. The authors explain that the birth of this reasoning can be traced back to two early cases in which a

> workman who might have been expected to be knocked down by the collision of a tug with a bridge was pinched between piles instead when the collision knocked out a brace, and an engine involved in a collision was thrown out of control, traveled in a circle, and collided again with the same train. Some "margin of leeway" has to be left for the unusual and the unexpected.

Id. (citing Hill v. Winsor, 118 Mass. 251 (1875) and Bunting v. Hogsett, 139 Pa. 363, 21 A. 31 (1890)).

[96]Brisboy v. Fibreboard Corp., 429 Mich. 540, 418 N.W.2d 650 (Jan. 25, 1988).

[97]"So long as there is a finding of proximate cause in each case, the negligence of the parties must be compared." *Id.*, 418 N.W.2d at 655.

[98]*Id.* The court noted that § 468 of the RESTATEMENT (SECOND) OF TORTS did not preclude apportionment under comparative negligence analysis even though the language of that section indicates that failure of a plaintiff "to exercise reasonable care for his own safety does not bar his recovery." RESTATEMENT (SECOND) OF TORTS § 468 (1964).

[99]*Brisboy*, 418 N.W.2d at 656-57.

[100]Nobles v. Unruh, 198 So. 2d 245 (Miss. 1967).

[101]*Id.* 198 So. 2d at 248 (emphasis in original) (Although this decision referred to a defendant's liability, proximate causation should not be tested differently when applied to the plaintiff's own contribution, or causation, or the harm); *accord* Tropea v. Shell Oil Co., 307 F.2d 757, 766 (2d Cir. 1962) ("in a general way"); Thornton v. Weaber,

Brisboy, it seems clear that Mr. Rand's lung cancer was foreseeable as a result of his smoking and would fit within Mississippi's definition of proximate cause.

It is true that courts traditionally have held that death is inherently incapable of being apportioned.[102] Assuming that in cases resulting in death, such as Rand's, a finding of "fault" on the part of the plaintiff should be essential to a reduced award, it does not necessarily follow that the court may not inquire whether the plaintiff himself caused some of the disability if he sues only for disability.

Section 433A of the Restatement makes it clear that apportionment may be appropriate irrespective of any finding of fault on the plaintiff's part.[103] This is especially evident when reading the official comments which accompany the text. Examples cited where apportionment is appropriate include those in which the negligence of the defendant combines "with a pre-existing condition which the defendant has not caused."[104] This would seem to apply to a case where the plaintiff's lungs have been affected by tobacco smoke prior to inhalation of asbestos fibers. Another example cited is a case in which "one of the causes in question is the conduct of the plaintiff himself whether it be negligent or innocent."[105] This seems to apply where smoke and asbestos fibers act together to inhibit plaintiff's breathing and thereby restrict his ability to function.

It is the court's responsibility to decide whether the plaintiff's harm is capable of being apportioned.[106] If that question is decided in the affirmative, then the judge is required to instruct the jury that, should it find that not all of the plaintiff's harm was the result of defendant's conduct, then it is to reduce the damages accordingly.[107] The burden of proof is upon the defendant who claims the damages should be apportioned.[108]

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380 Pa. 590, 595, 112 A.2d 344, 347 (1955) ("some injury of a like general character"); Carey v. Pure Distrib. Corp., 133 Tex. 31, 35, 124 S.W.2d 847, 849 (1939) ("the injury be of such a general character"); Byrnes v. Stephens, 349 S.W.2d 611, 614 (Tex. Civ. App. 1961) ("of such a general character as might have been anticipated").

[102]*See also* Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 57, 502 A.2d 1264, 1270 (1985).

[103]*See supra* note 9 and accompanying text.

[104]RESTATEMENT (SECOND) OF TORTS § 433A comment a (1964).

[105]*Id.*

[106]*Id.* § 434(1)(b).

[107]*Id.* § 434(2)(b).

[108]*Id.* § 433B. *Contra* Scott v. Rainbow Ambulance Serv. Inc., 75 Wash. 2d 494, 452 P.2d 220, 222 (1969) ("[If the plaintiff] is clearly one of two persons responsible for the injury involved, and plaintiff makes no attempt to segregate those damages, we find no over-riding reason in justice for shifting that burden of proof to the defendants").

B. Recent Application of Apportionment of Harm in Asbestos Litigation

Gideon v. Johns-Manville Sales Corp.,[109] is a leading case that held that evidence that the plaintiff is a cigarette smoker is admissible for purposes of the jury's determination of the cause of his illness.[110] In that case the plaintiff testified that for years he had been smoking a pack of cigarettes every day and that his doctor had advised him to quit smoking.[111] He refused to do so. The defendant introduced evidence of this fact to show that even if asbestos caused the plaintiff some injury, the plaintiff nevertheless had a duty to mitigate his damages and should not be allowed to recover for those injuries which he might reasonably have avoided.[112]

The court noted that it was wrong to characterize the mitigation issue as a "duty" of the plaintiff because a victim never owes a duty to the one who harms him.[113] "The principle, correctly stated, is that the injured person may not recover damages that do not result proximately from the defendant's breach of duty. Damages that might be avoided or mitigated are, therefore, not recoverable."[114] At first glance this may seem like mere semantics, but the court is actually recognizing a fine distinction. The court points out that mitigation simply, but crucially, bears directly on the issue of the extent of damages caused by the plaintiff's exposure to asbestos. No "duty" or "negligence" is necessary to a reduction of the award; mitigation is, rather, a natural consequence of the doctrine that a defendant shall not be required to pay for damages not proximately caused by his product or conduct. The *Gideon* court went on to conclude that the jury was capable of sifting through and weighing the evidence as to each potential cause of the plaintiff's injuries.[115] The concept of apportionment is an outgrowth of the same doctrine.

The same reasoning should be applied when a court is asked to assess the applicability of apportionment to a plaintiff's claim for damages. The authors of the Restatement agreed, as is evidenced by the comments and examples accompanying the text of section 433A.

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[109]761 F.2d 1129 (5th Cir. 1985).

[110]Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1139 (5th Cir. 1985).

[111]*Id.* at 1138.

[112]*Id.* at 1139.

[113]In the language of the court, "while it is commonly said that an injured party has a 'duty' to minimize damages, this is a misnomer, for the victim owes no duty to the person who hurts him." *Id.*

[114]*Id.*

[115]*Id.*

> A negligently scratches B's arm with a nail. The wound becomes infected, and B negligently fails to consult a physician until the infection has seriously damaged the arm. A is not liable for the aggravation of harm caused by B's negligence.[116]

The leading asbestosis case in which the section 433A doctrine of apportionment was applied is *Martin v. Johns-Manville Corp.*[117] The *Martin* court held that a damage award could be reduced if sufficient evidence existed such that a jury could come to a reasonable determination that part of the plaintiff's disability resulted from his smoking.[118] The plaintiff began smoking cigarettes in 1941. His smoking increased over the years until he was smoking two packs of cigarettes per day in the 1960's and 1970's. In 1978, after working with asbestos for 39 years, he became unable to work.[119] Prior to 1978, Martin was diagnosed as suffering from emphysema.[120] He believed his ailment was a result of his exposure to asbestos and of his tobacco smoking. Martin sued Johns-Manville for disability resulting from the manufacturer's failure to warn of the dangerous characteristics of asbestos. The jury was instructed that any damages it found could be reduced by the amount of his disability that was caused by his cigarette smoking.[121] When the jury awarded Martin $67,000, he appealed, arguing there was no factual basis for the apportionment instruction. That instruction stated:

> If after considering all of the evidence you find that Martin's condition was solely due to his smoking cigarettes, you would not award him any damages. If, however, you find that his condition was solely due to exposure to asbestos, then you would award him the full amount as you determine those damages to be. If, however, you find that his condition is due both to his cigarette smoking and to his exposure to asbestos, then you first determine what the total amount of damages are, and then the next thing you do is determine what percent of his condition is due to cigarette smoking, and then you will reduce the total amount by the percentage that you find is due to cigarette smoking.[122]

The Superior Court of Pennsylvania held that, based upon the facts of the case, the instruction was proper.[123]

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[116]RESTATEMENT (SECOND) OF TORTS § 433A, illus. 10 (1964).
[117]349 Pa. Super. 46, 502 A.2d 1264 (1985).
[118]*Id.* at 51, 502 A.2d at 1270.
[119]*Id.* at 49, 502 A.2d at 1266.
[120]*Id.*
[121]*Id.* at 50, 502 A.2d at 1266.
[122]*Id.*
[123]*Id.* at 51, 502 A.2d at 1267.

The medical testimony considered by the jury consisted of four medical doctors testifying on behalf of Mr. Martin and two on behalf of the defendant. Each of Martin's experts testified that he suffered from pulmonary disease consisting of both obstructive and restrictive components. Their testimony established that asbestosis is primarily a restrictive lung disease.[124] Additionally, even the plaintiff's expert witness established that emphysema and chronic bronchitis, from which the plaintiff also suffered, are (1) obstructive lung diseases[125] and (2) primarily caused by cigarette smoking.[126] One doctor testified that asbestosis also has some obstructive characteristics; for example, asbestos fibers may become trapped in air passages in the lung which can then become blocked.[127] One of the defendant's expert witnesses testified, however, that the plaintiff's x-rays "are not absolutely diagnostic of asbestosis."[128] Another of the defendant's doctors testified that the x-rays showed chronic obstructive lung disease caused by smoking.[129]

Testimony focusing on the plaintiff's overall pulmonary disability was much less exact. It was apparent that although both pulmonary impairment due to smoking and due to asbestos played a significant part in Martin's disability, neither one could be readily reduced to a specific percentage.[130] No doctor was able to conclude precisely what percentage of the disability was caused by the plaintiff's smoking.[131] Nevertheless, applying section 433A of the Restatement, the court held that sufficient evidence existed to enable the jury to reach a reasonable approximation of the relative contribution by each cause.[132]

> That the testimony did not establish the exact proportion that each disease contributed to [plaintiff's] disability suggests, not that the damages should not have been apportioned, but only that medical science has not yet been able to calculate the proportions as exact percentages. This inability does not diminish the fact that the causes of the harm were . . . distinct and capable of rough approximation.[133]

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[124]*Id.* at 52-55, 502 A.2d at 1267-68.

[125]An obstructive lung disease is one in which the airway passages in the lungs are blocked. LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 14, § 33.44a.

[126]*Martin*, 349 Pa. Super. at 52, 502 A.2d at 1267.

[127]Asbestosis is *primarily* a restrictive lung disease, as established by Martin's own doctors. *Id. See supra* text accompanying notes 17-19.

[128]*Martin*, 349 Pa. Super. at 53, 502 A.2d at 1268.

[129]*Id.*

[130]*Id.* at 53-55, 502 A.2d at 1258-59.

[131]*Id.*

[132]*Id.* at 57-8, 502 A.2d at 1270.

[133]*Id.* at 59, 502 A.2d at 1271.

It is important to note again that no finding of fault or breach of duty on the part of the plaintiff is necessary for apportionment to apply.[134] The *Martin* court adopted the reasoning of the Restatement and noted that damages may be apportioned even if the plaintiff has innocently contributed to his own harm.[135] It then emphasized that the "question whether [the plaintiff] was negligent in smoking cigarettes is irrelevant to deciding whether his damages may be reduced because of the part that smoking played in his disability."[136]

To evaluate the *Martin* court's judgment concerning apportionment based on rough approximation, it is helpful to examine other cases in which a similar result was reached. For example, in *Moore v. Johns-Manville Sales Corp.*,[137] a Texas court recently apportioned liability among several defendants even though the degree of relative causation had not been established scientifically. In that case, as in the *Martin* case, much evidence was given regarding the various types of pleural problems in the plaintiff's lungs. One expert testified, again in a manner similar to the doctors in *Martin*, " 'that there is no way to divide causation.' "[138] This addressed the issue of whether the damages are reasonably capable of being apportioned.[139] Notwithstanding the expert's testimony, the court held that if the factfinder is expected to conclude from the evidence that a product which a worker handled did or did not contribute to the plaintiff's disease, then the factfinder "should also be able at least to approximate the degree to which those products that pass the 'some effect' level caused the disease."[140] In other words, juries are expected to decide difficult fact issues all the time, and, if there is some basis upon which they can rely in connecting injury with causation, let them decide.

The court went on to note that, even assuming that medical testimony supported the proposition that asbestosis is indivisible, there is no rule that requires a jury to accept one of several expert theories on causation.[141]

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[134]RESTATEMENT (SECOND) OF TORTS § 433A comment a (1964).

[135]*Martin*, 349 Pa. Super. at 56, 502 A.2d at 1270.

[136]*Id.* at 56-57, 502 A.2d at 1270; *see also* Adams v. Johns-Manville Sales Corp., 727 F.2d 533 (5th Cir. 1984) (in this case the jury found that the plaintiff suffered from no asbestos related disabilities, relying on evidence that certain of his observed irregularities were attributable to his past heavy smoking).

[137]781 F.2d 1061 (5th Cir. 1986) (Three plaintiffs were suffering from asbestosis. Each of the defendants cross-claimed against each other. The court upheld a jury verdict that apportioned the liability among the various defendants for causing personal injury to the plaintiffs, each of whom had worked with the defendants' product).

[138]*Id.* at 1064.

[139]*Id.* at 1064-65.

[140]*Id.* at 1065.

[141]Note that the language of the court evidences the strong deference and trust that

The test of reasonableness of the jury's decision is simply whether there is sufficient evidence upon which it can rely in arriving at a rough approximation of the relative contributions.[142]

It is true that the apportionment in this case was not due to plaintiff's conduct. The reasoning, however, remains a constant and does not vary from case to case: The primary purpose of the system of tort jurisprudence is to see that plaintiffs are fairly compensated.[143] This necessarily implies that they are entitled to compensation only for those injuries the defendant caused. Accordingly, no defendant should be required to pay for damages which his conduct did not bring about. This is consistent with the primary purpose in that it helps to ensure the defendant will have the capacity to compensate future plaintiffs.[144]

V. Conclusion

It is generally accepted that asbestos fibers are toxic when inhaled and can cause severe pulmonary and respiratory problems. Similarly, it is rarely disputed that the inhalation of tobacco smoke causes severe problems of a like nature in those who choose to smoke cigarettes. When these two instrumentalities act in combination, the doctrine of apportionment should apply. Simply stated, a genuine issue of causation arises when a plaintiff who happens to be a smoker, brings an action against a manufacturer of asbestos, claiming his disability was caused by his exposure to the defendant's product.

A common theme emerges when one looks closely at the cases that have held apportionment to be applicable—one who contributes to his own disability will not be exculpated from responsibility merely because the defendant has acted to bring about some additional harm. This should be no less true merely because the defendant happens to be a manufacturer of asbestos.

The issue, and the focus of the courts, should be simply this: Is the injury reasonably capable of being separated as to result or cause?

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is placed upon juries:

> Juries are often asked to make difficult decisions and, even when expert evidence is available to assist them, they are not bound to follow the experts. The jury may discredit expert testimony and base its decision on its collective judgment and experience. Juries determine whether or not an illness was caused by a particular injury, the extent and duration of disability, and, in the present cases, whether the products of any defendant did or did not contribute to the cause of the plaintiffs' injuries. In none of these decisions is the jury controlled, although it may be guided by the expert witnesses.

Id. at 1064-65 (footnote omitted).

[142] *Id.* at 1065.

[143] *See generally* Prosser & Keaton, *supra* note 7, §§ 1, 2, & 4.

[144] *Id.*

The successive injury cases recognize the appropriateness of such an inquiry and generally find that separate instrumentalities contributed to the injury. The pre-existing condition cases apply the inquiry and generally find that more than one cause contributed to the plaintiff's overall injuries.

The rationale in these cases is the same, and, although those who apply the law must demonstrate compassion for disabled asbestos workers, one must not forget the primary goal of tort law. That goal is to place the plaintiff where he would have been had the defendant not wronged him; it is not to place him in a better position than he would have occupied absent the defendant's action. Finally, the legal system must continue to trust that juries have the capability to make the reasonable determinations necessary to achieve that goal. The tool to make that goal possible in the current and future asbestos cases is apportionment under Section 433A. Use of this doctrine will serve the important function of holding manufacturers accountable for harm caused by asbestos. At the same time, recovery will appropriately be limited only where the defendant can prove that a portion of the harm was caused by another, even if that other is the plaintiff.

JOHN G. SHUBAT

Remedies for Employer's Wrongful Discharge of an Employee from Employment of an Indefinite Duration

I. Introduction

For nearly a century the employment at will rule[1] remained one of the most well established rules in the law.[2] That is no longer true. Discharged employees in virtually every state have asked courts to recognize tort exceptions or contract limits to the rule, and most courts have agreed to do so. Although the rule still has force, no longer can an employer be sure that he will successfully defend a wrongful discharge action by filing a motion to dismiss for failure to state a claim.

Under the rule, if (1) the employment contract does not bind both the employer and the employee for a definite period or (2) the employee does not give consideration other than his services or his promise to serve, then an employee cannot enforce an employer's promise that the employer will discharge the employee only if the employer has good cause. Even if the employer makes such a promise, he has the right to discharge the employee at any time for any or no reason. The employer is not liable to the employee even if the employer discharges the employee for a "morally wrong" reason.[3] An at will employee has no legally protected interest in job security.[4]

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[1]*See infra* text accompanying note 2 for definition.

[2]"Few legal principles have been better settled than the at-will concept, whose roots date back to the 19th century laissez-faire policy of protecting freedom to contract." Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies As to Discharge*, 33 A.L.R.4th 120, 123 (1984). Most commentators trace the rule to Horace G. Wood's 1877 treatise Master and Servant, on the law pertaining to the relationship of master and servant. *See generally* Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 125-27 (1976). Feinman's article discusses at length the historical development of the rule. For other discussions of the historical development of the rule, see Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. Rev. 329, 332-35 (1982); Note, *Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335, 340-45 (1974) [hereinafter *Implied Contract Rights*].

[3]Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915), *cited* in Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate in Good Faith*, 93 Harv. L. Rev. 1816, 1819 (1980) [hereinafter *Good Faith Duty*]. "The general rule is that an employment contract at will may be terminated by either party with or without cause or justification. This means *a good* reason, *a wrong* reason, or *no reason*." Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130, 1131 (Ala. 1977) (citations omitted).

[4]In this Note "job security" means fredom from arbitrary discharge. A "promise of job security" is a promise to discharge an employee only for good or just cause. If an employee has a legally protected interest in job security, the employer cannot terminate the employment at will.

The employment at will rule is relatively new. Before the Industrial Revolution, the English common law courts presumed that the employment period was one year unless the parties agreed to a different period.[5] The rule developed in the United States near the end of the nineteenth century, and it is, at least in part, the product of laissez-faire economics and nineteenth century views of freedom of contract.[6] The rule protected the emerging class of industrialists by permitting labor costs to vary according to economic conditions, and it shifted the risk of reduced demand for labor from the employer to the employee.[7]

The legal and philosophical foundations of the employment at will rule have probably never been stronger than they were during the *Lochner* era (1900 to the mid-1930s).[8] During that period the Supreme Court held that an employer's right to discharge an at will employee was a fundamental property or contract right that the fifth[9] and fourteenth[10]

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[5]*See generally* Feinman, *supra* note 2, at 119-22; Murg & Scharman, *supra* note 1, at 332-33.

[6]Murg & Scharman, *supra* note 1, at 335-38.

[7]*Id.* at 335-36. Unemployment compensation absorbs some of the employee's risk and shifts some of the cost back to the employer.

[8]*See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-1 to -7 (1978). During the period the Court strictly scrutinized legislation that limited economic freedom. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[9]Adair v. United States, 208 U.S. 161 (1908). In *Adair* the Court said:

> While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is [sic] subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. . . . It was the legal right of the [employer] . . . to discharge [the employee] because of his being a member of a labor organization . . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Id. 174-75.

[10]Coppage v. Kansas, 236 U.S. 1 (1915). In *Coppage* the Court held unconstitutional a state law that made an employer who discharged an employee because of his association with a labor organization guilty of a misdemeanor. It rejected the argument that the law served the purpose of neutralizing the employer's unequal bargaining power. The court reasoned:

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible

amendments protected from federal and state regulation. Eventually the Court abandoned this view;[11] however, long after the courts conceded that the legislative branches have the power to limit an employer's right to discharge an employee,[12] the courts continued to reject employees' arguments that the common law also ought to limit the employer's right to discharge an employee.[13] Most states now recognize common law limits on an employer's right to discharge an employee even if the employment period is indefinite.[14] Discharged employees are now prevailing on both tort and contract theories.

> to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Id. at 17.

[11]*See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In *Jones & Laughlin*, the Court upheld the National Labor Relations Act and said:

> [T]he cases of *Adair v. United States* and *Coppage v. Kansas* are inapplicable to [the Act]. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce employees with respect to their self-organization and representation . . . .

Id. at 45-46 (citations omitted).

Recall the quotation from *Coppage*, *supra* note 10, and compare the following excerpt from the National Labor Relations Act:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate the recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

National Labor Relations Act, ch. 323, § 1, 49 Stat. 449, 449 (1935) (codified at 29 U.S.C. § 151 (1982)).

[12]Both federal and state statutes limit an employer's right to discharge an employee. *See* 29 U.S.C. § 623 (1982) (unlawful for an employer to discriminate against an employee because of age); 29 U.S.C. § 158(a)(3) (1982) (unlawful for an employer to discriminate against an employee in way that encourages or discourages membership in a labor organization); IND. CODE § 22-2-2-11 (1982) (a class C infraction for an employer to discharge or discriminate against an employee because the employee asserts rights under the state's minimum wage statute); *id.* § 22-8-1.1-38.1 (1982) (unlawful to discharge or discriminate against an employee because he or she filed a complaint or exercised rights under the Indiana Occupational Safety & Health Act); *id.* § 24-4.5-5-106 (1982) (unlawful to discharge an employee because of garnishment action against employee); *id.* § 35-44-3-10 (1982) (a class B misdemeanor for an employer to knowingly and intentionally dismiss or threaten to dismiss an employee because the employee served on a jury).

[13]*See* Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956) (employee has no cause of action against employer for damages if he alleges that he was discharged because he filed a workers' compensation claim); *accord* Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950).

[14]*See* cases cited *infra* at notes 66 & 70 "To date, the common law of three-fifths

A substantial number of recent cases and commentaries discuss the employment at will rule.[15] Most are concerned primarily with whether the common law should limit the rule and, if so, under what conditions it should do so. Few have discussed the remedies issues that arise if courts recognize the employee's cause of action.[16] Among the few cases that have explicitly dealt with the remedies issues no single view prevails. Nevertheless, remedies issues have been important. In at least one case, one reason the court cited for its refusal to recognize the employee's action was its inability to fashion an appropriate remedy if it allowed the action.[17] In another case, the court explicitly stated that it would allow a cause of action in contract but not in tort because, the court reasoned, a tort theory generally allows the plaintiff a more expansive measure of damages.[18]

A remedy ought to be as broad as, but no broader than, its corresponding substantive right, the underlying legally protected interest.

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of the states has recognized . . . a cause of action for wrongful discharge in one form or another." Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 1 (1984) (referring to cases reported through May 21, 1984).

[15]*See* Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protections Against Unfair Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976); *Good Faith Duty*, *supra* note 3; Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter *Public Policy Exception*]; Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777 [hereinafter *Protecting Whistleblowers*]; Murg & Scharman, *supra* note 2; Feinman, *supra* note 2; Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211 (1973).

[16]*See* Smith v. Atlas Off-Shore Boat Serv. Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981); Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1984), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985); Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983); Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *modified on another issue,* 101 N.M. 687, 687 P.2d 1038 (1984). *See also* Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449 (1985).

[17]Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979).

> Even if we were to exercise our power [to recognize the cause of action], what would be the measure of actual damages? If the employment could be truly terminated at any time for no reason at all, how would one carry the burden of proving more than nominal damages? It appears to us that the practical remedy would come, then, from recovering punitive damages. Such damages are allowable for reasons of public policy. We would thus create an action based upon an undeclared public policy where the measure of damages was governed only by the same source.

Id. at 692-93, 386 N.E.2d at 1028.

[18]Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 576, 335 N.W.2d 834, 841 (1983).

Because a fundamental principle of the law of remedies is that the nature and measure of the remedy should be congruent with the underlying legally protected interest,[19] it is necessary to identify that legally protected interest. One must remember that tort and contract theories protect different kinds of legal interests. Contract law protects the plaintiff's interest in a promise the defendant freely gave to him.[20] On the other hand, tort law protects the plaintiff from the defendant's invasion of an interest the law recognizes as worthy of legal protection apart from and despite what the defendant may have promised.[21] Because tort and contract laws protect different kinds of interests, the tort remedy will often differ from the contract remedy even if the underlying facts are similar.[22]

The purposes of this note are to identify the interests the law is protecting under the major contract and tort theories that now limit the employer's right to discharge an employee who is hired for an indefinite period and to suggest remedies theories that are consistent with these interests.

Part II discusses the traditional application of the employment at will rule. Part III discusses the predominant contract and tort theories that give an at will employee legally protected interests and limit an employer's right to discharge the employee. Part IV deals with the remedies issues and the problems raised in applying the contract and tort theories.

II. The Traditional Employment at will Rule.

In 1877 Horace G. Wood, a New York attorney and author of several legal treatises,[23] stated the American employment at will doctrine in unequivocal terms. Wood's statement of the rule is:

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[19]D. Dobbs, Handbook on the Law of Remedies, § 1.2, at 3 (1973).

[20]W. Prosser, The Law of Torts, § 92, at 614 (4th ed. 1971).

[21]*Id.*; Restatement (Second) of Torts § 1 comment d (1965).

[22]*See* W. Prosser, P. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 92, at 656-57 (5th ed. 1984) [hereinafter Prosser & Keeton]. One difference between tort and contract remedies is the extent to which the courts will allow the plaintiff to recover consequential damages. In contract, the "foreseeability" rule limits the recovery; in tort, proximate cause limits it. Dobbs, *supra* note 19, § 3.3, at 157-58. Generally, the foreseeability standard is more restrictive than the proximate cause standard. *See id.* § 12.3, at 803-10. Another difference between tort and contract is that courts sometimes permit punitive damages in tort; however, the courts rarely allow them in contract. *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 575, 335 N.W.2d 834, 841 (1983).

[23]*See* Feinman, *supra* note 2, at 125-26.

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.[24]

Although the authorities Wood cited to bolster his assertions apparently did not support them,[25] American courts universally accepted his rule.[26]

A. The Definite Duration Requirement

The rule adopted by American courts applies only if the employer and employee do not agree that the employment period will be for a definite period. If the parties specify a definite period, each party is bound for that period, and the employer has no right to discharge the employee without good cause.[27] Because the employer does not have the right to discharge the employee without good cause, the employee has a legally protected interest in his job during the specified period. If the employer wrongfully discharges the employee, the employee is entitled to damages for breach.

On the other hand, if the parties do not specify that the employment will be for a definite duration, the employee has no legally protected interest in his job. The employer may discharge the employee at any time for any or no reason, and the discharged employee generally cannot succeed if he sues for wrongful discharge[28] and the contract is too vague for the courts to enforce.[29]

Unless the parties expressly agree that the employment will be for a definite period, the courts presume that the parties intended employment for an indefinite period.[30] For example, in *Buian v. J. L. Jacobs & Co.*,[31] the court held that the employer's written statement that the

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[24]H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 136, at 283 (2d ed. 1886) restating the rule first put forth in the 1877 editions in substantially the same language. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 601, 292 N.W.2d 880, 886 (1980).

[25]*Toussaint*, 408 Mich. at 602-03, 292 N.W.2d at 886-87; *Implied Contract Rights*, *supra* note 2, at 341-42.

[26]Feinman, *supra* note 2, at 126-27.

[27]*See* Pepsi-Cola Gen. Bottlers v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 1982).

[28]*See id.* at 697.

[29]*Id.* at 699.

[30]*See* Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981).

[31]428 F.2d 531 (7th Cir. 1970).

employee's "assignment in Saudi Arabia will continue for a period of eighteen (18) months" was merely a statement of expectations and was not sufficient to create employment for a definite period.[32] In a few cases courts have found that the facts were sufficient to rebut the presumption.[33] Generally, however, courts construe a promise of "permanent" employment to be nothing more than a promise of "steady" employment.[34] That the employee's compensation is proportioned to units of time is not, by itself, sufficient to rebut the presumption that the employment period is indefinite.[35]

Frequently the reason the courts give for refusing to enforce an employer's promise of job security is that there is no "mutuality of obligation."[36] That is, the employer is bound to retain the employee, but the employee remains free to quit at any time.

B. The Independent Consideration Requirement

Even if the parties do not specify a definite employment period, courts will enforce an employer's promise of job security if the employee gives independent consideration to support the promise.[37] Independent consideration is consideration other than the employee's services or his promise to serve.[38] The compensation the employee receives for his services completes the exchange between the employer and the employee respecting the services, and nothing remains to support a promise of job security.[39]

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[32]*Id.* at 533.

[33]*See generally* Annotation, *Comment Note—Validity and Duration of Contract Purporting to be for Permanent Employment*, 60 A.L.R.3d 226 (1974) [hereinafter *Contract for Permanent Employment*].

[34]*Id.* at 232-33.

[35]Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895); *see also* RESTATEMENT (SECOND) OF AGENCY § 442 comment b (1957).

[36]*See* Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); *see also* Buian v. J. L. Jacobs & Co., 428 F.2d 531 (7th Cir. 1970) (a term in an employment agreement that allows the employee to quit at any time but requires the employer to retain the employee for 18 months is unenforceable because there is no mutuality of obligation). *See generally Contract for Permanent Employment*, *supra* note 33, 1A CORBIN, CONTRACTS § 152, at 13-17 (1963).

[37]*See* Ohio Table Pad Co. of Ind. v. Hogan, 424 N.E.2d 144, 146 (Ind. Ct. App. 1981); *see also* Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 440-41 (7th Cir. 1964). *See generally Contract for Permanent Employment*, *supra* note 33, at 237-49.

[38]*See* Hamblen v. Danners, Inc., 478 N.E.2d 926 (Ind. Ct. App. 1985) (to constitute independent consideration there must be a detriment to the employee and a corresponding benefit to the employer; a covenant not to compete is not independent consideration if not given in exchange for the alleged oral promise of permanent employment). *See generally Contract for Permanent Employment*, *supra* note 33, at 232-36.

[39]*Good Faith Duty*, *supra* note 3, at 1819.

Courts have found independent consideration where a prospective employee surrendered a personal liability claim against the employer,[40] conveyed an interest in land to the employer,[41] or abandoned his own competing business in exchange for the employer's promise of job security.[42] Generally, the employee's detrimental reliance on a promise of job security will not support the promise.[43] It is not enough that the employee has served the employer for several years, has foregone other opportunities, and has become virtually unemployable.[44] It is also not enough that an employee who relied on the employer's promise of job security quit her previous job and relocated in order to accept the employer's job.[45] Even if what the employee has given in exchange for the promise of job security is otherwise adequate, it is not adequate unless both parties clearly understand that the employee is giving it in exchange for the employer's promise of job security.[46]

C. Two Illustrative Cases

In *Shaw v. S.S. Kresge Co.*,[47] a discharged employee sued his former employer for wrongful discharge and the trial court granted summary judgment in favor of the employer. The employee alleged that the terms in an employee handbook became part of the employment contract at the time the employer hired the plaintiff. The handbook specified the grounds and procedures for discharging an employee, and the plaintiff alleged that the employer breached the contract because it did not act according to the handbook when it discharged the plaintiff. The appellate court rejected the employee's claim that the handbook terms became part of the employment contract.[48] Furthermore, the court stated, even if the handbook terms did become part of the contract:

> [I]n the absence of a promise on the part of the employer that the employment should continue for a period of time that is either definite or capable of determination, the employment

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[40]*See* cases cited in Ohio Table Pad Co. of Ind. v. Hogan, 424 N.E.2d 144, 146 (Ind. Ct. App. 1981). *See generally* RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1957); *Contract for Permanent Employment*, *supra* note 33, at 249-50.

[41]Mount Pleasant Coal Co. v. Watts, 91 Ind. App. 501, 151 N.E. 7 (1926).

[42]*See* Kravetz v. Merchants Distribs., Inc., 387 Mass. 457, 440 N.E.2d 1278 (1982).

[43]*See* Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir. 1964); Pepsi-Cola Gen. Bottlers v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 1982).

[44]*Pearson*, 332 F.2d at 441.

[45]Ohio Table Pad Co. of Ind. v. Hogan, 424 N.E.2d 144 (Ind. Ct. App. 1981) (merely puts the employee in a position to accept the employment).

[46]Lynas v. Maxwell Farms, 279 Mich. 684, 687, 273 N.W. 315, 316 (1937).

[47]167 Ind. App. 1, 328 N.E.2d 775 (1975).

[48]*Id.* at 6-7, 328 N.E.2d at 778.

> relationship is terminable at the will of the employer. There being no binding promise on the part of the employee that he would continue in the employment, it must also be regarded as terminable at his discretion as well. For want of mutuality of obligation or consideration, such a contract would be unenforc[ea]ble in respect of that which remains executory.[49]

According to the *Shaw* court, because there is no mutuality of obligation and no independent consideration, an employer's promise of job security is unenforceable even if the court assumes that the employer actually made the promise.[50]

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[49]*Id.* at 7, 328 N.E.2d at 779 (citations omitted).

[50]Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975).

In Streckfus v. Gardenside Terrace Cooperative, Inc., 504 N.E.2d 273 (Ind. 1987), the Supreme Court of Indiana apparently overruled this holding. In *Streckfus* the defendant Gardenside owned a housing development. Defendant Triangle managed it, and Triangle's management duties included hiring and firing employees. According to the management agreement between Triangle and Gardenside, Triangle could discharge the resident manager (1) with prior approval from Gardenside after showing a sufficient reason for discharging the manager or (2) without prior approval from Gardenside, if Triangle had good cause to immediately discharge the manager, subject to Gardenside's later approval. Triangle hired Streckfus as resident manager. Later, Triangle recommended that Streckfus be fired, and Gardenside approved. Streckfus sued both Triangle and Gardenside alleging that she could be fired only for just cause and that the defendants had no just cause to fire her. The trial court granted the defendant's motion for summary judgment, and the Indiana Court of Appeals affirmed. Streckfus v. Gardenside Terrace Cooperative, Inc., 481 N.E.2d 423 (Ind. Ct. App. 1985).

The court of appeals did not consider whether the agreement contained a promise that the defendants would not fire Streckfus without just cause. Instead the court stated:

> Even if Streckfus were promised that she would only be discharged for cause, she remained an employee at will. To convert employment at will to employment requiring good cause for termination, independent consideration supplied by the employee, which results in detriment to her and a corresponding benefit to the employer, must be given in return for permanent employment.

Id. at 425 (citation omitted).

The supreme court affirmed the summary judgment but vacated the court of appeals decision. *Streckfus*, 504 N.E.2d at 276. The court said:

> Under the employment at will doctrine, an employment contract of indefinite duration is *presumptively terminable* at the will of either party. . . . Nevertheless, we are cognizant that *the employment at will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the formation of a contract.* Therefore, should parties to an employment contract choose to include a job security provision in the contract, enforcement of such a provision would not necessarily conflict with the employment at will doctrine.

Id. at 275 (citations omitted, emphasis added). The court scrutinized the agreement and held that, as a matter of law, the agreement did not include a job security provision; it merely required "sufficient reason" to discharge, that is, "information upon which a decision could be made." *Id.* at 276. Therefore, the court said, "[I]t is presently inap-

In *Pearson v. Youngstown Sheet & Tube Co.*,[51] the employee claimed that the employer breached an implied contract for permanent employment. The employee argued that the consideration for the promise of permanent employment was the detriment he suffered as a consequence of his twenty-eight years of service for the employer and the employee's unemployability resulting from this service. The court called this claim "a novel theory, unknown to the law so far as we are aware,"[52] and added,

> This contention is a tacit admission that there was no consideration in the beginning but that at some point over the years there emerged a consideration sufficient to support the contract for permanent employment. This theory overlooks the important fact that at any time during those years either of the parties had a right to terminate the plaintiff's employment, and that he received all the compensation which defendant promised to pay.[53]

Because the employee "received all the compensation which the [employer] promised to pay," there was no consideration remaining to support an implied contract for permanent employment even if the employee did suffer a detriment.

III. Contract Law Limits on an Employer's Right to Terminate Employment of Indefinite Duration

Through the 1950's the employment at will rule remained almost entirely immune from attack unless the legislature expressly limited the employer's right to discharge an employee.[54] For example, in *Raley v.*

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propriate for us to address the question concerning whether separate and independent consideration should continue to be a prerequisite to the enforceability of an express job security provision." *Id.* Nevertheless, what the court did in *Streckfus*, as well as what the court said, indicates that in Indiana it is no longer true that no matter what the employer promises, a promise of job security is unenforceable as a matter of law. Apparently it does matter what the employer promises; if that is not true, there would have been no reason for the court to scrutinize the agreement to see what, if anything, the employer had promised.

[51]332 F.2d 439 (7th Cir. 1964).

[52]*Id.* at 440.

[53]*Id.* at 441.

[54]In Kouff v. Bethlehem-Alemeda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949), the court recognized a cause of action for wrongful discharge where an employer discharged an employee for serving as an election officer. There was, however, a statute that made such a discharge unlawful. *Id.* at 323, 202 P.2d at 1060. This note focuses on cases where the court recognizes a discharged employee's common law cause of action even though no statute expressly makes the discharge unlawful.

Darling Shop of Greenville, Inc.,[55] the court refused to recognize that an employee stated a cause of action when she alleged that the employer discharged her because she had filed a workers' compensation claim.[56] Even though the court acknowledged that the employer's conduct "might be considered reprehensible,"[57] the court refused to recognize the claim. The court reasoned: (1) because the employer could discharge the employee at any time, there was no breach of contract, and (2) because the employer was unable to prevent the employee from filing her workers' compensation claim, she suffered no legal injury.[58]

In 1959 the California District Court of Appeals held that courts could find that important public policies limit an employer's right to discharge an at will employee even if the legislature has not expressly created such a limit.[59] In *Petermann v. International Brotherhood of Teamsters, Local 396*, the court held that an at will employee stated a cause of action if he alleged that he had been discharged because he refused to obey his employer's order to give perjured testimony and instead testified truthfully.[60] The *Petermann* court reasoned that allowing an employer to discharge an employee because he refused to commit perjury would seriously jeopardize the legislative policy against perjury.[61] Even though the legislature did not expressly make the discharge unlawful, the court reasoned that it must recognize the employee's cause of action "in order to more fully effectuate the state's declared policy against perjury. . . ."[62] This was the beginning of the public policy tort exception to the employment at will rule.[63]

In *Frampton v. Central Indiana Gas Co.*,[64] the Supreme Court of Indiana became the first state court of final appeal to hold that a discharged at will employee stated a cause of action against her former employer when she alleged that the discharge interfered with an important public policy interest, i.e., she was fired because she filed a workers' compensation claim.[65] Several other courts have followed the lead of the *Petermann* and *Frampton* courts. These courts have indicated that

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[55]216 S.C. 536, 59 S.E.2d 148 (1950).

[56]*Id.*

[57]*Id.* at 538, 59 S.E.2d at 149.

[58]*Raley*, 216 S.C. 536, 595 S.E.2d 148; *accord* Petrus v. Christy, 365 Mo. 1187, 295 S.W.2d 122 (1956).

[59]Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

[60]*Id.*

[61]*Id.* at 188, 344 P.2d at 27.

[62]*Id.* at 189, 344 P.2d at 27.

[63]*See infra* text accompanying notes 183-242.

[64]260 Ind. 249, 297 N.E.2d 425 (1973).

[65]Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

a discharged employee has a cause of action in tort if the employer discharged the employee in a way that interferes with an important public policy interest.[66]

Courts have also recognized contract law limits on an employer's right to discharge an employee hired for an indefinite period. For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*,[67] the Supreme Court of Michigan held that an employee who is hired for an indefinite period can bargain for an enforceable promise of job security even if there is no "mutuality of obligation" and no independent consideration.[68] In addition, the *Toussaint* court declared that an employee who reasonably relies on the employer's promises of job security in an

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[66]In at least the following cases the courts have held, or have indicated that they are willing to hold, that an employee has a cause of action in tort if he alleges that the employer discharged him in a way that interferes with an important public policy interest: Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug., 1981) (federal maritime tort); Knight v. American Guard & Alert, 714 P.2d 788 (Alaska 1986); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Parner v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Larrabee v. Penobscot Frozen Foods, 486 A.2d 97 (Me. 1984); Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981); DeRose v. Putnam Management Co., 398 Mass. 205, 496 N.E.2d 428 (1986); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982); Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984); Sides v. Duke Hosp., 74 N.C. App. 331, 335 S.E.2d 818, *petition for review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Geary v. United States Steel Corp., 465 Pa. 171, 319 A.2d 119 (1978); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985); Clanton v. Cain-Sloan Co., 677 S.W.2d 733 (Tenn. 1984); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); Harless v. First Nat'l Bank in Fairmont, 162 W. Va. 116, 246 S.E.2d 270 (1978).

In Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983), the court indicated that it was willing to recognize the cause of action in contract but not in tort.

Some courts have explicitly refused to recognize the tort: Hinrichs v. Tranquillaire Hosp., 352 So. 2d 1130 (Ala. 1977); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

[67]408 Mich. 579, 292 N.W.2d 880 (1980).

[68]*Id.*

employee handbook can enforce those promises.[69] Most states have held, or have indicated that they may hold, that an employee can enforce an employer's promise of job security even if the employment period is indefinite and if the employee gives no independent consideration for the promise.[70]

A. Contract Law Limits on an Employer's Right to Discharge an Employee

Generally, a promisee can enforce a promise if the promisee gives consideration for the promise,[71] and the courts do not demand "mutuality of obligation."[72] In addition, the same consideration can support more than one promise[73] Under the traditional application of the employment at will rule (discussed in Section II of this Note), the courts refused

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[69]*Id.*

[70]In at least the following cases the courts have held, or have indicated that they are willing to hold, that an employee may enforce an employer's promise of job security even if the employment period is indefinite and the employee gives no independent consideration for the promise: Peters v. Alabama Power Co., 440 So. 2d 1028 (Ala. 1983); Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983); Leikvold v. Valley View Community Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Griffin v. Erickson, 277 Ark. 433, 642 S.W.2d 308 (1982); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Finley v. Aetna Life & Casualty Co., 5 Conn. App. 394, 499 A.2d 64 (1985); Watson v. Idaho Falls Consol. Hosps., Inc., 111 Idaho 44, 720 P.2d 632 (1986); Duldulao v. Saint Mary of Nazareth, 115 Ill. 2d 482, 505 N.E.2d 314 (1987); Romack v. Public Serv. Co. of Ind., 511 N.E.2d 1024 (Ind. 1987); Streckfus v. Gardenside Terrace Cooperative, Inc., 504 N.E.2d 273 (Ind. 1987); Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Larrabee v. Penobscot Frozen Foods, 486 A.2d 97 (Me. 1984); Staggs v. Blue Cross of Md., Inc., 61 Md. App. 381, 486 A.2d 798 (1985); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Arie v. Intertherm, Inc., 648 S.W.2d 142 (Mo. Ct. App. 1983); Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983); Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985); Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617, *petition for review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986); Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 443 N.E.2d 150 (1985); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983); Ramos v. Henry C. Beck Co., 711 S.W.2d (Tex. Ct. App. 1986); Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985).

[71]RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979).

[72]*Id.*

[73]*Id.* § 80 comment a.

to apply these basic contract principles to the employment relationship. Instead the courts demanded mutuality of obligation or independent consideration in order to permit an employee to enforce a promise of job security. If the employee proved that the employer made the promise and that the employee detrimentally relied on the promise, the employee might recover reliance damages, but he could not enforce the promise.[74]

Despite the harsh results,[75] the rule remained so firmly established that Professor Blades, in his often cited article on employer abuse of the rule, declared that it was unlikely the courts would recognize contract law limits.[76] Professor Blades was incorrect; most states will now enforce an employer's promise of job security even where the traditional employment at will doctrine would apply. Consequently, an employer who promises job security may be liable in contract if he discharges an employee without good cause. As one might expect, the two theories the courts most frequently rely on are (1) promise plus consideration and (2) promise plus the employee's reasonable reliance on the promise.

1. Consideration Plus Promise: Bargained-For Exchange as a Basis for Enforcing an Employer's Promise of Job Security.—In *Toussaint v. Blue Cross & Blue Shield of Michigan*,[77] the court held that a discharged employee could enforce the employer's promise of job security if the employee had bargained for it, even though the only consideration the employee gave for the promise was his promise to serve the employer.[78] The *Toussaint* court rejected the employer's argument that the promise was unenforceable because there was no mutuality of obligation and because the employee had given no independent consideration for the promise.[79] The court declared that the employment at will rule is merely a rule of contract construction[80] and "[t]he enforceability of a contract depends . . . on consideration and not mutuality of obligation."[81] Furthermore, the court declared the employee has presented enough evidence

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[74]*See* Pepsi-Cola Gen. Bottlers, Inc. v. Woods, 440 N.E.2d 696, 699 (Ind. Ct. App. 1982).

[75]"An employer might use a threat of discharge, for example, to impair an employee's freedom against self-incrimination, his political free choice or his right to speak out on the issues of the day. A threat to an employee's job might also secure his unwilling participation in almost any kind of immoral or unlawful activity." Blades, *supra* note 15, at 1407-08 (footnotes omitted).

[76]*Id.* at 1421.

[77]408 Mich. 579, 292 N.W.2d 880 (1980).

[78]*Id.*

[79]*Id.* at 600, 292 N.W.2d at 885.

[80]*See also* Streckfus v. Gardenside Terrace Coop., Inc., 504 N.E.2d 273 (Ind. 1987) "[T]he employment at will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the formation of a contract." *Id.* at 275.

[81]*Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885.

to overcome a directed verdict if the employee testifies that he and the employer understood, at the time they formed the contract, that the employer would not discharge the employee without just cause.[82]

Similarly, in *Weiner v. McGraw-Hill, Inc.*[83] the New York Court of Appeals rejected the employer's argument that the employer's promise of job security is unenforceable unless there is mutuality of obligation or independent consideration. In *Weiner* the employee claimed that McGraw-Hill agents had assured him that it was company policy not to discharge an employee without just cause. Weiner claimed that he relied on this promise and gave up accrued fringe benefits and a promised salary increase from his previous employer in order to accept the McGraw-Hill offer. Weiner also claimed (1) an employee handbook also contained the promise not to discharge him without good cause, (2) the parties expressly incorporated the handbook in Weiner's job application that he and two McGraw-Hill agents signed, and (3) the employment application was part of his employment contract. In addition, Weiner claimed that McGraw-Hill required him to follow the handbook procedures when disciplining and discharging his subordinates and that he had rejected other job offers because he was relying on the McGraw-Hill promise. After McGraw-Hill fired him, Weiner sued for breach of contract alleging, in the court's words, that "he was discharged without the 'just and sufficient cause' or the rehabilitative efforts specified in the employer's personnel handbook and allegedly promised at the time he accepted the employment."[84]

The court held that Weiner had a cause of action in contract and said

> [t]hat [the fact that the discharged employee] was free to quit his employment at will, standing by itself, was not entitled to conclusory effect. Such a position proceeds on the oversimplified premise that, since the [employee] was not bound to stay on, the agreement for his employment lacked "mutuality", thus leaving the [employer] free to terminate at its pleasure. But this would lead to the not uncommon analytical error of engaging in a search for "mutuality", which is not always essential to a binding contract, rather than of seeking to determine the presence of consideration, which is a fundamental requisite. For, while coextensive promises may constitute consideration for each other, "mutuality", in the sense of requiring reciprocity, is not necessary when a promisor receives other valid consideration.

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[82] *Id.*

[83] 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

[84] *Id.* at 460, 443 N.E.2d at 443, 457 N.Y.S.2d at 194.

. . .

> Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee.[85]

In *Romack v. Public Service Co. of Indiana*,[86] the Indiana Supreme Court also found that the traditional employment at will, independent consideration and mutuality of obligation doctrines do not always apply. The court, adopting Judge Conover's dissenting opinion in the court of appeals decision, held that an employee has given independent consideration if (1) the employee is uniquely qualified for the job, (2) he gave up "lifetime employment" with the state police to take the job, (3) the employer recruited the employee, (4) the employee agreed to accept the job only if the employer offered the same permanency, and (5) the employer agreed that he would have permanent employment.[87]

In both *Toussaint* and *Weiner* the courts found the employer's offers of job security were part of the bargained-for exchanges that formed the employment contracts.[88] In *Pine River State Bank v. Mettille*,[89] the Supreme Court of Minnesota went a step further and held that an employee may enforce the employer's promise of job security even if the employer offers it and the employee accepts it after the parties have established an at will employment relationship.[90] In *Mettille* the employer had distributed an employee handbook several months after the employee began working for the employer. The handbook included sections on job security and disciplinary procedures.[91] The court said that, although "general statements of policy . . . do not meet the contractual requirements for an offer,"[92] specific language in an employee handbook could be an offer of a unilateral contract.[93] The employee accepts the offer

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[85]*Id.* at 463-64, 443 N.E.2d at 444-45, 457 N.Y.S.2d at 196-97.

[86]511 N.E.2d 1024 (Ind. 1987), *vacating* 449 N.E.2d 776 (Ind. Ct. App. 1986) (adopting dissenting opinion of the appellate court).

[87]*Romack*, 511 N.E.2d at 1026 (incorporating by reference 449 N.E.2d at 776-78 (dissenting opinion)).

[88]In both *Toussaint* and *Weiner* the plaintiff had specifically asked about job security during the pre-employment negotiations. In each case the employer's agent indicated that it was company policy not to discharge an employee without just cause.

[89]333 N.W.2d 622 (Minn. 1983).

[90]*Id.*

[91]For the text of the handbook provisions, see *id.* at 626 nn. 2 & 3.

[92]*Id.*

[93]*Id.* at 630. The court found that a "Job Security" provision was "no more than a general statement of policy." *Id.* A "Disciplinary Policy" provision did have sufficiently specified language to indicate an offer of a unilateral contract. *Id.* It provided for detailed pre-discharge procedures—oral reprimand, written reprimand, meeting with manager, suspension, and review by the Executive Officer. *Id.* at 626 n. 3.

if he remains on the job,[94] and "by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer."[95]

2. Employee Reliance as a Basis for Enforcing the Employer's Promise of Job Security.—The contract doctrines of offer, acceptance, and bargained-for exchange explain the holdings in *Toussaint*, *Weiner*, and *Mettille*. The employee can enforce the employer's promise of job security because the employee has given consideration for the promise. Although generally a promise that is not supported by consideration is not enforceable, the courts will sometimes enforce a promise even if there is no consideration to support it.[96] For example, the court may enforce a promise if the promisee's justifiable reliance on the promise induces him to act on the promise, if the promisor should have expected the promise to induce the action and the court can avoid injustice only by enforcing the promise.[97] Several courts have applied this principle to the employment relationship and have enforced the employer's promise of job security.[98]

In *Toussaint* the court declared that a promise of job security "may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements."[99] Thus, promises in an employee handbook may be enforceable. The *Toussaint* court stated:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever

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[94]*Id.* at 627.

[95]*Id.*

[96]RESTATEMENT (SECOND) OF CONTRACTS §§ 82-90 (1979).

[97]*Id.* § 90.

[98]*See* Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Forrester v. Parker, 93 N.M. 781, 601 P.2d 191 (1980); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984).

[99]408 Mich. at 598, 292 N.W.2d at 885.

> the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."[100]

The employee handbook statements are enforceable because the "employees could justifiably rely on those expressions and conduct themselves accordingly,"[101] and because the employer hopes to "benefit [from] improved employee attitudes and behavior and improved quality of the work force."[102] Under such conditions "the employer may not treat its promise as illusory."[103] Several other courts have followed *Toussaint* and have held that an employee may enforce an employer's promise of job security if the employee justifiably relies on the promise.[104]

In *Pugh v. See's Candies, Inc.*,[105] the California Court of Appeals declared, "the totality of the [employment] relationship" may give "rise to an implied promise [that the employer] would not act arbitrarily in dealing with its employees."[106] Among the circumstances that may justify a jury finding that the employer made such a promise are longevity of service, promotions and commendations, employer assurances of job security, and employer practices.[107] In *Cleary v. American Airlines, Inc.*[108] a different division of the California Court of Appeals held "that the longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause."[109] The *Cleary*

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[100]*Id.* at 613, 292 N.W.2d at 892, (citing Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917)).

[101]*Id.* at 617, 292 N.W.2d at 893.

[102]*Id.* at 619, 292 N.W.2d at 895.

[103]*Id.*

[104]*See* Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984).

> [I]f an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

Id. at 548, 688 P.2d at 174. *See also* Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984).

> [I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, these promises are enforceable components of the employment relationship.

Id. at 230, 685 P.2d at 1088.

[105]116 Cal. App. 3d 31, 171 Cal. Rptr. 917 (1981).

[106]*Id.* at 329, 171 Cal. Rptr. at 927.

[107]*Id.*

[108]111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

[109]*Id.* at 456, 168 Cal. Rptr. at 729.

court went further than most other courts and also held that there is an implied-in-law covenant of good faith and fair dealing in every employment contract.[110] Nevertheless, the *Cleary* decision seems to rest primarily on the principle of employee reliance on the employer's promise. In both *Pugh* and *Cleary* the courts found that the employee reasonably relied on an implied promise that the employer would not discharge the employee arbitrarily.[111]

B. The Public Policy Exception: The Tort of Abusive Discharge

Several jurisdictions have recognized that tort law limits an employer's right to discharge an at will employee.[112] Most have adopted what is known as the "public policy exception."[113] In general, the courts allow the discharged employee's tort claim if the employee alleges that the discharge interferes substantially with an important public policy interest.[114] To prevail, the employee must allege and prove (1) that he

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[110]*Cleary* may stand for the proposition that there is an implied-in-law covenant of good faith and fair dealing in employment contracts that limits the right of the employer to terminate the employment. *See* the court's discussion of the *Cleary* decision in Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 328-29, 171 Cal. Rptr. 917, 926-27 (1981); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 384-86, 710 P.2d 1025, 1039-40 (1985); *see also* Murg & Scharman, *supra* note 2, at 361-67.

> The *Cleary* court certainly used broad language: Termination of employment without legal cause after such a period [eighteen years of continuous employment] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer . . . to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain—benefits described in the complaint as having accrued during plaintiff's 18 years of employment.

111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729.

[111]In *Cleary* the employee had worked for the employer continuously for eighteen years, and he had received several minor promotions. He also had a substantial interest in retirement benefits which depended on his continued employment. Additionally, the employee handbook indicated that the employer would discharge employees only for just cause. *Clearly*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

In *Pugh* the employee had been employed for thirty-two years. He started as a pots-and-pans washer and had been promoted to vice-president in charge of production. A former general manager had assured the employee that his future was secure if he did a good job. The employee also presented evidence that indicated that the employer had fired the employee because he actively resisted the employer's "sweetheart" deal with a union. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

[112]*See* cases cited *supra* note 66.

[113]*See* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); *see also Public Policy Exception*, *supra* note 15.

[114]*See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981). Courts and judges disagree whether a particular public policy interest is sufficiently important. Compare, for example, the majority and dissenting opinions in *Palmateer*.

sought to or did exercise a personal right or a public obligation or refused to commit an unlawful act (2) that arises out of a sufficiently important public policy interest, and (3) that the employer discharged the employee (4) because the employee sought to or did exercise the personal right or public obligation or refused to do the unlawful act.[115]

The abusive discharge[116] cases fall into one of three broad classes. The first class includes cases where the important public policy interest is one involving the employee's personal right and where there is either a connection between the right and the employee's status as an employee[117] or the personal right is so important that it supersedes the employer's right to discharge an at will employee.[118] The second class includes those cases where the public policy interest imposes an important public obligation on the employee that supersedes the employer's right to discharge an at will employee.[119] In the third class are those cases where the employer discharged the employee because he refused to perform an

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[115]*Cf.* Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 566-67 (1986) (the three elements of the plaintiff's prima facie case are: (1) plaintiff exercised a statutory or constitutional duty, (2) plaintiff was discharged, and (3) there is a causal link between the exercise of the right and the discharge).

[116]Courts and commentators also use the terms "retaliatory discharge" and "wrongful discharge." *See* Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 694 n.2 (W. Va. 1982). In this note, "retaliatory discharge" and "abusive discharge" are synonyms and apply where the employer discharged an employee because the employer wanted to retaliate against the employee who has exercised a public policy right or obligation. The term "abusive discharge" emphasizes that the employer has abused his common law right to terminate the employment. "Wrongful discharge" refers to any discharge for which the employer is or may be liable.

[117]*See* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (employee fired for filing a worker's compensation claim); *accord* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *cf.* Campbell v. Ford Indus., 266 Or. 479, 513 P.2d 1153 (1973) (plaintiff had no cause of action because there was no connection between the statutory public policy interest, protection of minority shareholder's interests, and the plaintiff's status as an employee). *See generally Protecting Whistleblowers*, *supra* note 15, at 803-05.

[118]*See* Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W.Va. 1984) (right of privacy; employee fired for refusing to take a lie detector test).

[119]*See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (obligation to report crimes); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (obligation to serve on a jury). *But cf.* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980), *transfer denied* 421 Ind. 1099 (1981) (FDA violations). In the following cases the courts found that the public policy obligation did not supersede the employment-at-will rule but the courts indicated that some public policy interests might supersede the rule: Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (medical ethics); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (product safety).

unlawful act.[120] In each class of cases, the essence of the employee's claim is that the employer's motive for discharging the employee was to thwart an important public policy interest, and the effect of the discharge, if the courts do not intervene, will be to thwart the public policy interest.

1. Protecting the Employee's Personal Rights.—Frampton v. Central Indiana Gas Co.[121] is typical of cases in the first class. In *Frampton* the discharged employee alleged that the employer discharged her because she had filed a workers' compensation claim. The court reviewed the purpose of the workers' compensation statutes and noted that a fundamental purpose of the legislation is to avoid the difficulties employees encountered at common law in actions to recover damages for job related injuries.[122] The court found that "[t]he basic policy behind such legislation is to shift the economic burden for employment connected injuries from the employee to the employer,"[123] and that the statutes give the employee a right to receive compensation for those injuries and obligate the employer to pay for them.[124] In order to effect the legislative policies, the court reasoned:

> [T]he employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.[125]

The court found that this particular discharge was the kind of "device" the statute prohibited[126] and reasoned that refusing to recognize the

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[120]*See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (price fixing); McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988) (truck weight limits).

[121]260 Ind. 249, 297 N.E.2d 425 (1973).

[122]*Id.* at 251-52, 297 N.E.2d at 427.

[123]*Id.* at 252, 297 N.E.2d at 427.

[124]*Id.*

[125]*Id.* at 252-53, 297 N.E.2d at 427.

[126]"We believe the threat of discharge to be a 'device' within the framework of the [statute], and hence, in clear contravention of public policy." *Id.* at 252, 297 N.E.2d at 428. The statute provided, "No contract or agreement, . . . no rule, regulation, or *other device* shall, in any manner, operate to relieve any employer . . . of any obligation created by this act." IND. CODE § 22-3-2-15 (1971) *quoted in Frampton*, 260 Ind. at 252, 297 N.E.2d at 427-28.

employee's claim would not only discourage employees from asserting their rights but would also permit "coercion and other duress-provoking acts" on the part of some employers.[127]

There are two major themes in *Frampton*. First, some public policy interests supersede the employment at will rule: "[W]hen an employee is discharged solely for exercising a statutorily conferred right an exception to the [employment at will rule] must be recognized."[128] Second, an employer abuses his right to discharge at will employees if he uses such right to discharge in a way that thwarts those public policy interests: "If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined."[129]

These themes are typical in abusive discharge cases. Several other courts have echoed these themes and have held that despite the employment at will rule, an employer does not have the right to fire an employee because he files a workers' compensation claim.[130] Other courts have recognized a discharged employee's cause of action where the employee alleged that he had been discharged because he asked to be transferred from a job that he believed was hazardous or unhealthful,[131] because the employee refused to take a polygraph test,[132] and because the employee filed a personal injury claim against the employer.[133]

2. Protecting Public Obligations.—In *Nees v. Hocks*,[134] the Oregon Supreme Court held that an employer was liable in tort because he discharged an employee who agreed to serve on a jury after the employer had instructed her to avoid jury duty.[135] According to the *Nees*

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[127]260 Ind. at 252, 297 N.E.2d at 428.

[128]*Id.* at 253, 297 N.E.2d at 428.

[129]*Id.* at 251, 297 N.E.2d 427; *cf.* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937) ("The [National Labor Relations] Act does not interfere with the normal exercise of the right of the employers to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees . . . .").

[130]*See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Murphy v. City of Topeka-Shawnee Labor Servs., 6 Kan. App. 488, 630 P.2d 186 (1981); Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Sventko v. Kroger Co., 69 Mich. App. 644, 265 N.W.2d 385 (1978); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981); Brown v. Transcom Lines, 284 Or. 597, 588 P.2d 1087 (1978); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

[131]Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985).

[132]Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984).

[133]Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981).

[134]272 Or. 210, 536 P.2d 512 (1975).

[135]*Id.*

court, the question is whether "there [are] instances in which the employer's reason or motive for discharging harms or interferes with an important interest of the community, and, therefore, justifies compensation to the employee?"[136] The court answered by stating that such instances do exist and found that the state's constitution and statutes and the common law of other jurisdictions supported the court's conclusion that the duty to serve on a jury is one of those important interests.[137] The court reasoned:

> These [authorities] clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted.[138]

Because the court found that the public policy that created the duty to serve on a jury supersedes the public policy embodied in the employment at will rule, the court affirmed the trial court's judgment that the employer was liable in tort.[139]

Using similar reasoning, the Supreme Court of Appeals of West Virginia held that a discharged employee stated a cause of action in tort by alleging that he was discharged because he reported the employer's violations of state and federal consumer credit statutes.[140] In *Harless v. First National Bank in Fairmont*[141] the court said:

> We conceive that the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.[142]

In *Romack v. Public Service Co. of Indiana*,[143] the Indiana Supreme Court held that an employee who was hired as the Operation Security

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[136]*Id.* at 216, 536 P.2d at 515.

[137]*Nees*, 272 Or. 210, 536 P.2d 512.

[138]*Id.* at 219, 536 P.2d at 516.

[139]*Nees*, 272 Or. 210, 536 P.2d 512. The court reversed the trial court's punitive damages award. *Id.*

[140]Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

[141]246 S.E.2d 270 (W. Va. 1978).

[142]*Id.* at 275 (footnote omitted).

[143]511 N.E.2d 1024 (Ind. 1987), *aff'g in part and rev'g in part*, 499 N.E.2d 768, 776 (Ind. Ct. App. 1986) (adopting the dissenting opinion of J. Conover from the appellate court decision urging modification of prior case law on issue of breach of employment contract).

Manager at a nuclear power plant construction site could sue his employer who fired him because he refused to ignore safety problems.[144] In *Romack* the court found that the public policy in the Atomic Energy Act[145] justified the cause of action.[146]

3. Protecting the Public Interest in Discouraging Unlawful Acts.— In *Tameny v. Atlantic Richfield Co.*,[147] the discharged employee alleged that he was discharged because he refused to participate in the employer's gasoline price fixing scheme. In *Tameny*, the Supreme Court of California stated, "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and the employer and serve to contaminate the honest administration of public affairs.'"[148] Therefore, the court concluded, "[F]undamental principles of public policy and adherence to the objectives underlying the state's penal statutes require the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act."[149]

In *McClanahan v. Remington Freight Lines, Inc.*,[150] the Indiana Supreme Court expressly stated no state "statute states that public policy is violated by committing an illegal act or requiring an employee to do so at the risk of his job . . . ."[151] However, the court held that a former truck driver who alleged that he was fired because he refused to drive across another state in violation of that state's weight limit laws stated a cause of action.[152] It reasoned:

> Depriving [the employee] of any legal recourse under these circumstances would encourage criminal conduct by both the employee and the employer. Employees faced with the choice of losing their jobs or committing an illegal act for which they might not be caught would feel pressure to break the law simply out of financial necessity. Employers, knowing the employee's

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[144]511 N.E.2d at 1026, adopting dissenting opinion in 499 N.E.2d at 779-80.

[145]42 U.S.C. §§ 2011-84 (1982).

[146]*Romack*, 511 N.E.2d at 1026 adopting dissenting opinion in 499 N.E.2d at 779-80. *See supra* note 144.

[147]27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

[148]*Id.* at 173, 610 P.2d at 1333, 164 Cal. Rptr. at 842, (quoting Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (1959)).

[149]27 Cal. 3d at 174, 610 P.2d at 1333-34, 164 Cal. Rptr. at 843 (footnote omitted).

[150]517 N.E.2d 390 (Ind. 1988).

[151]*Id.* at 393.

[152]McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390, 392-94 (Ind. 1988).

susceptibility to such threats and the absence of civil retribution, would be prompted to present such an ultimatum.[153]

IV. Remedies for an Employee Wrongfully Discharged from Employment Having an Indefinite Duration.

A. Contract Remedies

1. Damages.—Generally, contract law protects the promisee's interest in the benefit of the promisor's broken promise; courts usually allow the promisee to recover damages measured by his expectation interest, that is, the actual benefit the promisee would have received had the promisor fully performed the promise.[154] Courts often allow the promisor to show that the promisee avoided, or could have avoided, some of the harm he suffered as a result of the breach.[155] Thus the promisee's damages award is usually his expectation interest minus the loss he avoided or could have avoided.[156]

Damages for an employer's breach of an employment contract follows this same general pattern. In most states, when an employer breaches an employment contract that has a definite duration, the wronged employee is entitled to receive damages measured by the value of the unfulfilled portion of the contract minus the amount the employee received or could have received from substitute employment.[157] In most states, substitute employment is any employment the wrongfully discharged employee actually accepts or, if the employee has not accepted other employment, substitute employment is defined as any available employment with similar conditions and rank and in the same locality as the employment from which the employee was wrongfully discharged.[158] The employee should also be allowed a credit for his reasonable expenses incurred in finding, or attempting to find, substitute employment.[159] Thus the employee's damages is the value of the unfulfilled portion of the contract minus what the employee earned or could have earned from substitute employment plus the employee's reasonable expenses in finding or attempting to find a new job.

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[153]*Id.* at 393.

[154]Restatement (Second) of Contracts § 347 (1979).

[155]*Id.* § 350. *See generally* Dobbs, *supra* note 19, § 3.7.

[156]*See generally* Farnsworth, Contracts § 12.9 (1982).

[157]Dobbs, *supra* note 19, § 12.25.

[158]*Id.* § 12.25.

[159]C. McCormick, Handbook on the Law of Damages § 163, at 636 (1935); *cf.* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981) (tort action).

If the employment agreement has a definite duration, determining the value of the unfulfilled portion of the contract is relatively simple. It is only necessary to determine the amount of time remaining on the contract and the rate at which the employee would have been paid and would have received other benefits had the employer not breached the contract.[160] Even if the rate of pay and benefits depends, for example, on future profits or sales rather than being fixed, there are usually some concrete facts from which the jury can calculate the value of the unfulfilled portion of the contract. In any event, the duration of the contract limits the contract's value.

If the court enforces an employer's promise not to discharge the employee without good cause and if the employment was for an indefinite period, there is no such limit on the employee's damages award. By its terms the contract will continue until the employee quits, retires, or dies, or until the employer discharges the employee for good cause. In order to determine the unfulfilled portion of the contract, the jury must determine the earliest time that one of these events would have occurred had the employer not breached the contract. In addition, the jury must determine the rate of pay and the value of other benefits the employee would have received during this period.

The employee need not present mathematically precise evidence on either of these issues as long as the employee does present evidence to support the jury's award.[161] The employee's past employment history, his age, his prospects for promotion, his stake in retirement benefits that depend upon continued employment and other factors may provide an adequate basis for an award. Perhaps the employee can show that but for the employer's breach the employee would have received pay raises or would have been promoted.[162]

Although courts should allow an employer to show that the employee could have obtained substitute employment, it may not be clear what "substitute employment" means when the employer has discharged an employee from employment offering both job security and an indefinite duration. If substitute employment is defined as employment with similar

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[160]DOBBS, *supra* note 19, § 12.25. It is not always easy to determine the remaining unfulfilled period. In Dixie Glass Co. v. Pollak, 341 S.W.2d 530 (Tex. Civ. App. 1960), *aff'd per curiam* 162 Tex. 440, 347 S.W.2d 596 (1961), the court held that it was proper for the trial court to allow the jury to find that the wrongfully discharged employee would have exercised options to renew his employment contract for additional definite periods.

[161]RESTATEMENT (SECOND) OF CONTRACTS § 352 comment a (1981).

[162]*Cf.* Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983) (abusive discharge tort action).

conditions, is an at will job substitute employment?[163] If it is, should the courts allow the employee to show that his new employer may discharge him long before the unfulfilled period of the original employment would have expired?[164]

If the court decides that at will employment is not substitute employment, then the law gives the wrongfully discharged employee no incentive to accept at will employment,[165] thus encouraging social and economic waste.[166] The courts should, therefore, decide that the defendant-employer may show that acceptable at will employment was available to the discharged employee; the court would then allow a reduction of employee's damages by the amount that the employer shows the employee could have earned from the at will employment. On the other hand, the wrongfully discharged employee is entitled to the value of the employer's broken promise of job security. Thus, courts should allow the employee to show that the value of the at will employment he accepted or could have accepted is less than the value of the employment the defendant-employer promised to give. Courts should allow the jury to discount the value of the at will employment when the jury calculates the employee's damages. If the employer shows that the employee accepted or could have accepted at will employment, then the employee's damages award should be (1) the value of the unfulfilled portion of the original contract plus (2) the expenses the employee incurred while seeking other employment minus (3) the value of the other employment the

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[163]*Cf.* Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40 (N.Y. Sup. Ct. 1951), *aff'd*, 279 A.D. 992, 112 N.Y.S.2d 494 (1952), *aff'd*, 305 N.Y. 48, 110 N.E.2d 551 (1953) (plaintiff wrongfully discharged from employment of definite duration permitted to reject alternate at-will employment, in part, because plaintiff could be discharged from such employment arbitrarily).

[164]The employee may find that he is in a delicate position. In order to prove that his tenure with the former employer would have been relatively long-lasting but for the wrongful discharge, the employee will probably emphasize his qualities as a good employee. If he does this, he may undermine his argument that the substitute employment is likely to be short lived, especially if the jury perceives that employers do not, as a rule, arbitrarily discharge good employees even though the specific employer may do so.

There is some support for the view that an employee cannot reject employment solely because the employment period is or may be shorter than the unfulfilled portion of the original employment contract. *See generally* Annotation, *Nature of Alternative Employment Which Employee Must Accept to Minimize Damages for Wrongful Discharge*, 44 A.L.R.3d 629, 653 (1972).

[165]As a practical matter, there are probably few wrongfully discharged employees who have the financial resources to remain unemployed. Financial pressures are more likely to influence the unemployed, wrongfully discharged employee than are legal pressures.

[166]For an article presenting an economic argument against the common law substitute employment rules because, according to the author, the rules encourage economic waste, see Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*. 56 IND. L.J. 207 (1981).

employee accepted or should have accepted (4) discounted to account for the risk that it is less valuable than the unfulfilled portion of the original employment.

This measure of damages will be appropriate if the court is enforcing a bargained-for promise of job security as in *Weiner* or *Romack*. If the court is enforcing the promise of job security because the employee justifiably relied on an unbargained-for promise, then the employee may not be entitled to such an expansive remedy. There is less reason to give the promisee his expectation interest when the promise the court is enforcing is not one that both parties freely bargained for. According to the Restatement, if the court enforces an unbargained-for promise, "[t]he remedy . . . may be limited as justice requires."[167] The Restatement comment indicates that the same factors creating the employee's right to a remedy are also important when determining the nature and the measure of the remedy.[168]

A full contract remedy may be appropriate if the employee cannot readily obtain other employment or if he had a significant stake in benefits that depended upon continued employment in the original job and induced the employee to rely on the employer's promise of job security.[169] In many other cases the employee's loss due to reliance on the employer's promise is little more than the opportunity or the will to seek other seemingly less secure employment. In those cases the courts should limit damages to the amount the employee lost up to the time he obtains or could have obtained other suitable employment, whether it is at will or otherwise, plus the cost of finding the other employment. The courts should not allow the employee to show that any at will employment he accepted or could have accepted is less valuable than the original employment. By the time the employee accepts or could have accepted other comparable employment, even if it is at will employment, the employee has suffered all the loss he will suffer as a consequence of his reliance on the employer's promise.[170] In essence,

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[167]RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

[168]*Id.* comment d.

[169]Compare:

> [T]he employee who has enough mobility to avoid the consequences of his discharge will also have enough mobility to make him an unlikely target for oppression by the employer. But where the employee's experience is of special value only in his present employment or where his advanced age makes it doubtful that he can readily obtain comparable employment, he is more susceptible to improper exertion of the employer's power and less likely to succeed in mitigating damages.

Blades, *supra* note 15, at 1426.

[170]*Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981) (the promisee's reliance interest may be a more just measure of damages than is his expectation interest).

this measure of damages merely shifts the risks of a low demand for labor from the employee to the employer. That is all that justice requires in these cases.

2. Reinstatement.—When courts enforce promises of job security in employment contracts having no definite duration, damage awards are likely to be both substantial and inaccurate because they may be based on imprecise, almost speculative, evidence in order to establish the value of the promised employment minus the value of the substitute employment. Therefore, the courts reconsider their traditional dislike for specific performance—reinstatement—and give thought to it as a remedy for an employer's breach of an employment contract. If, as some believe, juries may favor the wrongfully discharged employee,[171] then damages are not only likely to be imprecise but also substantial.[172] Of course, the damages award may also be too small. That damages cannot be measured with a reasonable degree of accuracy is one reason for the courts to grant an equitable remedy such as reinstatement.[173]

Courts probably have refused to order reinstatement[174] because they did not want to supervise a long term relationship that depends upon cooperation between hostile parties.[175] In addition, if the employment contract has a definite duration and a well defined value, the courts most likely believe that damages are adequate, or at least are not so inadequate that the court ought to become entangled in the parties' relationship. Even if that view is correct, it is far less correct if the employment contract has no definite duration. Damages may not be adequate. There is a substantial risk that courts will either under-compensate or over-compensate the employee, and once the court determines that the employer is liable, both the employer and the employee may prefer reinstatement over the risk that the jury will award damages that are either too high or too low. Even if the court has additur and remittitur authority, some risk remains. The employee might also prefer reinstatement over damages because other employers may be reluctant

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[171]"[T]here is the danger that the average jury will identify with, and therefore believe, the employee." Blades, *supra* note 15, at 1428.

[172]*See* Brewster v. Martin Marietta Aluminum Sales, Inc., 145 Mich. App. 641, 378 N.W.2d 558 (1985) (economic damages for breach of an employment contract $750,000); *see also* McGrath v. Zenith Radio Corp., 651 F.2d 458 (7th Cir. 1981) (jury verdict of $1,000,000 not supported by the evidence).

[173]*See* DOBBS, *supra* note 19, § 2.5, at 57-58.

[174]"Reinstatement" in this note means ordering the employer to return the wrongfully discharged employee to the same or similar employment from which the employee was discharged and ordering the employer to pay backpay and restore the employee's benefits and seniority, if any.

[175]*See* DOBBS, *supra* note 19, § 12.25, at 929-31; RESTATEMENT (SECOND) OF CONTRACTS § 367 comment b (1981).

to hire a "trouble-maker" who is suing his former employer.[176] The employer might also prefer reinstatement; at least the employer will receive the benefit of the services that the court will otherwise force him to pay. Finally, society will benefit if reinstatement avoids social and economic waste.[177]

That reinstatement will not work in many, or even most, cases is no reason to refuse to grant it in every case. Statutes often include reinstatement with backpay as a remedy for wrongful discharge,[178] and the courts enforce the remedy.[179] There is no reason to believe that reinstatement will be more difficult to administer and enforce if it is a contract remedy than it is if it is a statutory remedy. The courts can apply the same standards in either case.

If a statute gives courts the discretionary authority to reinstate an employee, the courts often focus on two factors: (1) the likelihood that the parties will cooperate and (2) the degree of trust and cooperation the job requires.[180] Any hostile feelings between the parties is significant even if no objective basis exists for those feelings.[181] That the feelings exist at all is reason to doubt that the parties will cooperate. On the other hand, not all jobs require cooperation, trust, or close supervision,[182] and the situation itself may induce the parties to attempt to cooperate. An employee who seeks reinstatement probably prefers the job from which he was discharged over vengeance. Prudent, self-interested employers may decide that cooperation is better than lost profits. Rein-

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[176]*Cf.* Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983) (discharged employee unable to find work in the banking industry after employer wrongfully discharged him from his position in a bank).

[177]*Cf.* DeFranco, *Modification of the Employee At Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy*, ST. LOUIS U.L.J. 65, 85 (1985) stating: "[T]he remedy of reinstatement, although difficult to implement in many situations if a union is not available to oversee implementation and protect the worker against harassment, nevertheless prevents the employee from obtaining a 'windfall' by getting paid for work never performed." (footnotes omitted).

Reinstatement is sometimes an ineffective remedy under the National Labor Relations Act. *See* Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357 (1981). According to Chaney, nearly 90% of the employees in his study who were awarded reinstatement for the employer's violation of section 8(a)(3) of the National Labor Relations Act had left within one year. *Id.* at 360. According to Chaney, one of the reasons the remedy is not effective is that the NLRB does not effectively enforce its reinstatement orders. *Id.* at 363-64.

[178]*See, e.g.*, IND. CODE § 34-4-29-1 (1982) (employee discharged because he served on a jury may bring a civil action for reinstatement, lost wages, and attorney's fees).

[179]*See* RESTATEMENT (SECOND) OF CONTRACTS § 367 comment b (1981); DOBBS, *supra* note 19, § 12.25, at 929-31.

[180]*See, e.g.*, Combs v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla.

[181]*Id.* at 846.

[182]DOBBS, *supra* note 19 § 12.25.

statement will be an effective remedy in some cases; in those cases the courts ought to allow the employee to have that remedy. If the court finds that enforcing the remedy is too difficult in particular cases, the court can always dissolve the order and grant damages. In cases where one party has been particularly uncooperative, the court might reduce or increase the award.

B. An Employee's Tort Remedies for Abusive Discharge

1. A Survey of the Cases.—In his treatise on damages, Professor McCormick said this about abuse of process awards: "[T]he courts will give compensation, within limits not yet definable."[183] We can say the same about abusive discharge awards. The courts have approved compensatory damages awards as small as a few hundred dollars and as large as several hundred thousand dollars.[184]

Because courts have been concerned primarily with substantive issues, there are relatively few opinions dealing with remedies issues. Those courts that have dealt with remedies issues generally agree that economic harm, such as lost wages, is a proper element of the plaintiff's measure of damages,[185] but they do not agree whether emotional harm, loss of reputation, or humiliation are proper elements,[186] and they do not agree whether to allow punitive damages.[187]

In *Smith v. Atlas Off-Shore Boat Service, Inc.*[188] the Fifth Circuit Court of Appeals characterized abusive discharge "as an intentional tort, entitling the [plaintiff] to compensatory damages . . . including the [plaintiff's] expenses of finding new employment, lost earnings while the [plaintiff] seeks another position, and lost future earnings. . . . In addition to these economic losses, the [plaintiff] may be entitled to recover

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[183]McCormick, *supra* note 159, § 109, at 384.

[184]*Compare* Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353 (1978) ($749) *and* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) ($650) *with* Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983) ($270,000).

[185]*See* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985); Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983); Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

[186]*Compare* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug., 1981) (emotional loss is a proper element of damages) *with* Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984) (emotional loss is not a proper element of damages).

[187]*Compare Vigil*, 102 N.M. 682, 699 P.2d 613 (punitive damages permitted) *with* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (punitive damages not permitted).

[188]653 F.2d 1057 (5th Cir. Unit A Aug. 1981).

compensatory damages for mental anguish . . . ."[189] Because the court determined that a punitive damage award would unduly restrict an employer's ability to operate his business, it held that the plaintiff could not recover punitive damages.[190]

In *Harless v. First National Bank in Fairmont*,[191] the West Virginia Supreme Court of Appeals held that a discharged employee could recover damages for emotional harm by showing that he was unable to eat or sleep and that he became depressed and withdrawn as a result of the wrongful discharge.[192] The court reasoned "that the tort of retaliatory discharge carries with it a sufficient indicia of intent" to justify including emotional harm as an element of the plaintiff's damages.[193] The court also indicated that the employee may recover punitive damages if "the employer's conduct is wanton, willful or malicious."[194] The plaintiff does not have an automatic right to receive punitive damages;[195] instead, "the plaintiff must prove further egregious conduct on the part of the employer."[196] The court indicated that punitive damages will be proper "where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment."[197]

In *Vigil v. Arzola*,[198] the Court of Appeals of New Mexico declared that the objective of the tort is to encourage job security and said, "[T]he damages might include lost wages while unemployed, the cost and inconvenience of searching for a new job, moving costs for relocating, and possible punitive damages. . . . [I]n order to prevent any chilling effect on the employer's freedom in hiring . . . mental suffering and similar damages of a non-pecuniary nature will not be allowed."[199]

In *Wiskotoni v. Michigan National Bank-West*,[200] the Sixth Circuit Court of Appeals applied Michigan law and held that generally the

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[189]Id. at 1064.

[190]*Id.*

[191]289 S.E.2d 692 (W. Va. 1982).

[192]*Id.*

[193]*Id.* at 702; *see also* Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982) (damages for emotional loss are permitted in Indiana if a legal right is invaded in a way that provokes emotional disturbance even if there is no physical injury; damages for emotional harm are appropriate in abusive discharge cases).

[194]*Harless*, 289 S.E.2d at 703.

[195]*Id.*

[196]*Id.*

[197]*Id.* n.19.

[198]102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *modified on other issue*, 101 N.M. 687, P.2d 1038 (1984).

[199]*Id.* at 689, 699 P.2d at 620-21.

[200]716 F.2d 378 (6th Cir. 1983).

employee may recover damages for emotional harm; however, if the employee presents no "specific and definite evidence of his own mental anguish, anxiety or distress," he cannot, as a matter of law, recover damages for emotional harm.[201] The court also held that the employee presents sufficient evidence to justify an award for loss of reputation if he shows that because of the discharge he was unable to find work in his field.[202]

Several courts that have recognized an action in abusive discharge have stated that punitive damages may be proper in such cases, but have refused to approve an award for punitive damages when the case before the court was the first case in which the court had recognized the cause of action.[203] These courts reasoned that it would be improper to grant punitive damages because the defendant could not have anticipated that he would be liable for discharging the employee. The courts relied on this rationale in both *Nees v. Hocks*[204] and in *Kelsay v. Motorola, Inc.*[205] Although the *Kelsay* court refused to approve the punitive damages award in the case then before it, the court indicated that generally the plaintiff would be able to recover punitive damages:

> In the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim. For example in this case, the plaintiff was entitled to only $749 compensatory damages . . . . The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this state . . . .[206]

2. Compensatory Damages.—It is easy to state that the primary purpose of compensatory damages in tort is to provide a monetary award that will restore the plaintiff to a position that is substantially equivalent to the position he enjoyed immediately before the defendant committed

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[201] *Id.* at 389.

[202] *Id.* at 390.

[203] *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 6 Kan. App. 2d 488, 630 P.2d 186 (1984); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

[204] 272 Or. 210, 536 P.2d 512 (1975).

[205] 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

[206] *Id.* at 186-87, 384 N.E.2d at 359.

the tort.[207] It is much more difficult to give those words concrete meaning particularly when the harm the plaintiff suffers is not economic. The new contract exceptions to the traditional employment at will rule recognize and protect an employee's legally protected interest in his job. For the most part the harm the wrongfully discharged employee suffers is the economic value of his lost job. The discharged employee who prevails on one of these contract theories is not an at will employee; the law recognizes that he has a legally protected interest in his job.

On the other hand, the public policy tort exception to the rule does not provide legal protection for the employee's interest in job security as such; it protects other interests. The tort is an exception to the rule only in the sense that an employer may be liable for discharging an at will employee. The employee remains an at will employee who has no legally protected interest in his job.[208] Some courts have recognized that the employee does not have a legally protected interest in his job; some of these courts have reasoned that, therefore, the employee has suffered little or no harm.[209] These courts have confused substantive issues with remedies issues and have failed to identify the interests the tort remedy seeks to protect.

In order to properly analyze the remedies problems, one must first distinguish "injury" from "harm." According to the Restatement, an "injury" is "the invasion of any legally protected interest of another."[210] Substantive tort law protects an interest if it is of such social importance that "imposing liability on those who thwart its realization" is justified.[211] To say that the defendant has injured the plaintiff is to assert both that the plaintiff has a substantive right and that he is entitled to a remedy.

"Harm" is "the existence of loss or detriment in fact of any kind to a person resulting from any cause."[212] It includes "impair[ment of one's] physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests."[213] Unless the plaintiff suffers an injury, he is not entitled to a remedy for the harm he suffers;[214] however, if the defendant causes an injury—an invasion of a legally protected interest—then harm has

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[207]RESTATEMENT (SECOND) OF TORTS § 901 comment a (1977).

[208]Because tort liability exists apart from contract, the tort may also protect employees other than at will employees. *See* PROSSER & KEETON, *supra* note 22, § 92, at 656-57.

[209]*See, e.g.*, Martin v. Platt, 179 Ind. App. 688, 692-93, 386 N.E.2d 1026, 1028 (1979) (because the employer could have discharged the employee at any time the employee could suffer no more than nominal damages).

[210]RESTATEMENT (SECOND) OF TORTS § 7(1) (1964).

[211]*Id.* § 1 comment a.

[212]*Id.* § 7(2).

[213]*Id.* comment b.

[214]*Id.* comment d.

legal significance. The plaintiff's measure of damages depends, in part, upon the amount of harm the defendant caused.[215] If the defendant injures the plaintiff, the plaintiff may receive damages for harm he suffers even if the harm suffered would not independently amount to a legal injury. For example, states recognizing intentional or negligent infliction of emotional distress as an independent tort only in limited circumstances will nevertheless permit the plaintiff to recover for emotional harm in many circumstances.[216]

Even if the plaintiff suffers a legal injury that results in harm, determining the plaintiff's damages is not simply a matter of measuring and valuing the amount of harm. The plaintiff's damages will also depend upon what are essentially legal policy issues.[217] These policy issues determine whether the defendant is liable and, if he is, the extent of the plaintiff's measure of damages, that is, the kinds of harms the court will allow the jury to consider when it calculates the plaintiff's damages. One way the courts limit the plaintiff's damages is through the concept of proximate cause. The rule that the defendant will be liable only for the harm his tort proximately causes often merely states a legal policy conclusion that the court will allow the plaintiff to recover damages for certain kinds of harms but not for others.[218] How far the courts will go depends primarily upon two factors: (1) how culpable the defendant is and (2) the nature of the legally protected interest. Courts are more likely to expand the plaintiff's measure of damages if the defendant committed an intentional tort rather than if the defendant was merely negligent.[219] One almost intuitively expects that courts will be more likely to allow the plaintiff a broader measure of damages for redress of an invasion of a personal interest than for redress of an invasion of a property interest.[220]

An at will employee certainly has an interest in job security, but he does not have a legally protected interest in job security. The tort of abusive discharge does not protect that interest. Instead, the tort protects important public policy interests: "The foundation of the tort

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[215]*Id.* § 903. Not all harms suffered by the plaintiff are elements of his measure of damages. The plaintiff must also show that the defendant's tortious conduct was the cause in fact of the harm. In addition, rules concerning certainty of proof of damages and the concept of proximate cause also limit the plaintiff's recovery. *See* DOBBS, *supra* note 19, § 3.3; *see also* MCCORMICK, *supra* note 159, § 72, at 260 (discussing the limiting effect of proximate cause).

[216]*See generally* PROSSER & KEETON, *supra* note 22, § 12.

[217]*See* DOBBS, *supra* note 19, § 3.3, at 157 & n.36.

[218]PROSSER & KEETON, *supra* note 22, § 42, at 274-75.

[219]*See* DOBBS, *supra* note 19, § 6.4, at 461.

[220]*Cf.* DOBBS, *supra* note 19, § 3.2, at 142 (stating that one function of general damages rules is to conform to substantive policy).

of retaliatory discharge lies in the protection of public policy."[221] The courts recognize the cause of action because allowing an employer to discharge an employee without being liable for doing so would jeopardize an important public policy interest.[222]

The employer is not liable because he discharged an at will employee; he is liable because the discharge was the means by which the employer committed the tort.[223] The discharge is merely the means by which the employer interferes with the workers' compensation statutes, the penal statutes, an employee's obligation to serve on a jury, the duty to report nuclear safety violations, or any one of a number of other important public policy interests.

In addition to the important public policy interests that the tort of abusive discharge protects, the courts ought to consider the policies implicit in the employment at will rule: the belief that an employer should have considerable freedom to make business judgments and to select and retain his employees. Society has an interest in productivity as well as in protecting its public policy interests. If the plaintiff's measure of damages is too large, the courts may hamper an employer's legitimate hiring and firing decisions. Consequently, an employer may decide not to discharge an unproductive employee. If the measure of damages is too small, the tort will not adequately protect the important public policy interests.

Abusive discharge is an intentional tort.[224] In order to establish a prima facie case, the employee must show that the employer desired to interfere with an important public policy interest or that the employer believed that it was substantially certain that his conduct would interfere

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[221]Palmateer v. International Harvester Co., 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981).

[222]*See supra* text accompanying notes 113-154. Courts often emphasize the significance of the public policy interest at stake. *See* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 380, 710 P.2d 1025, 1035 (1985) ("important public policy interests embodied in the law"); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881 (1981) ("clearly mandated public policy"); Hansen v. Harrah's, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984) ("strong public policy"); *see also* Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 479 (1980) ("In *Nees* and *Sventko* the courts protected the underlying activity for which the employee was discharged. The jury system and the workmen's compensation system were the legislatively expressed social interests to be protected, not society's interest in a stable economy.").

[223]*Cf.* Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (court sustained discharged employee's action for intentional infliction of emotional distress when the employer, suspecting that an unidentified employee was stealing, threatened to and did fire employees in alphabetical order because the thief did not confess).

[224]*See* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

with the public policy interest.[225] An employer who has committed abusive discharge is in no position to complain that a damages award might interfere with his legitimate business decisions. Courts should not be too concerned that a substantial damages remedy will interfere with the employer's right to discharge at will employees. The employer's right to discharge at will employees is not the issue; it is the employer's abuse of that right.[226] The courts should interfere with that kind of conduct and should provide the injured employee with a substantial remedy so that he is "fully compensated in damages."[227]

If the courts allow the plaintiff to recover substantial compensatory damages, certainly some innocent employers might be affected. That an at will employee can now allege an action at all increases the chances that a discharged employee will sue. It also decreases the chances that the employer will win at the pleadings stage. Consequently, an employer, who fears a lawsuit may decide not to fire an unproductive employee. Courts may also be tempted to sharply limit the plaintiff's measure of damages. The courts should avoid this temptation; the proper way to screen meritless claims and to protect innocent defendants is through the use of substantive law, not through the law of remedies. Any time the law recognizes a cause of action there is some risk that plaintiffs will file frivolous lawsuits and that an innocent defendant will lose.[228] This is part of the price paid for living in an organized society. Legal truth is not always the same as absolute truth. That some innocent employers may be liable is a poor reason to limit an abusively discharged employee's damages. It is, however, a good reason for the courts to define the tort of abusive discharge as precisely as possible and to recognize the cause of action only when the important public policy

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[225]"Intent" is defined as "denot[ing] that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1964).

[226]Some commentators have noted some general similarities between abuse of process and abusive discharge:

> [I]t thus appears that there are some situations in which a tort will be committed by the unjustifiable use of legal and economic pressure to accomplish a collateral objective necessarily involving harm to others. . . . [Courts have] begun to limit the right of employers to discharge employees at will . . . where the exercise of [the employer's] traditional rights is contaminated by motives that are strongly inconsistent with public policy.

1 HARPER, JAMES & GRAY, THE LAW OF TORTS § 4.9, at 484-86 (2d ed. 1986). "Just as the use of legal processes as a means of extortion gives rise to a damage remedy, so too should the oppressive use of the right of discharge." Blades, *supra* note 15, at 1424.

[227]Frampton v. Central Ind. Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973).

[228]*Cf.* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977) ("The possible inundation of suits [in abusive discharge] is, of course, no reason to prevent the redress of a legal wrong.").

interest at stake outweighs the extra burden on the employer's legitimate business interests. If the public policy interest is important enough that the court ought to recognize the employee's cause of action, then it is important enough to justify a substantial damages award. If the public policy interest is not that important, the courts should not recognize the cause of action at all.[229]

A discharged employee may suffer virtually any kind of harm possible. The loss of employment affects a person economically; moreover, "deprivation of a job, if more than a casual one, not only affects usually a man's reputation and prestige, but ordinarily may so shake his sense of security as to inspire, even in men of firmness, deep fear and distress."[230] Some discharged employees may suffer emotional trauma that is almost as severe as the trauma one experiences when a close relative dies. In some cases the employee's emotional distress may affect his family. An employee who prevails in an abusive discharge action should receive substantial damages for harm the employee can show resulted from the discharge including at least economic harm, emotional harm, humiliation, and loss of reputation.

3. Punitive Damages.—The primary purposes of punitive damages are to punish wrongdoers, deter wrongful conduct, and prevent self-help.[231] A punitive damages award takes tort law beyond its primary purpose by also compensating the injured plaintiff for injuries he has suffered.[232]

One difference between punitive damages and compensatory damages is the manner in which they are measured. Even though many kinds of harm for which the courts allow compensatory damages cannot be measured in terms of money, the purpose of compensatory damages is to provide a monetary substitute for the harm the plaintiff suffered.[233] The focus is on the plaintiff's harm; the award is proportioned according to the amount of harm. When the jury awards punitive damages, it focuses on the defendant and his conduct,[234] and may also consider

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[229]Whether a particular public policy interest is important enough to justify recognizing the employee's cause of action is a hotly debated issue. Compare the majority and dissenting opinions in Wiskotoni v. Michigan National Bank-West, 716 F.2d 378 (6th Cir. 1983); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); and Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984).

[230]McCormick, *supra* note 159, § 163, at 639.

[231]Restatement (Second) of Torts §§ 901 comment c & 908 (1977).

[232]*Id.* comment b.

[233]*Id.* § 901 comment a.

[234]*Id.* § 908 comment e.

the defendant's wealth.[235] Consequently, punitive damages should provide the plaintiff with a total damages award that is greater than the value of the harm he suffered. An award of punitive damages is, or should be, an extraordinary remedy that courts should reserve for extraordinary cases.[236]

In some of the abusive discharge cases, courts have severely limited the plaintiff's measure of compensatory damages, but they have allowed the plaintiff to recover punitive damages.[237] These courts are probably allowing the plaintiff to recover punitive damages as a substitute for the substantial compensatory damages the plaintiff deserves but does not receive.[238] The plaintiff does not receive adequate compensatory damages primarily because these courts have not distinguished injury from harm. That an at will employee has no legally protected interest in his job prevents these courts from recognizing that the legal injury is only tangentially related to the employee's interest in his job and that the employee is entitled to compensatory damages for the harm the employer's tort proximately causes, even though that harm deserves no independent legal protection. If the courts allowed the abusively discharged employee to recover adequate compensatory damages, courts would have no reason, except in extraordinary cases, to allow the plaintiff to also receive punitive damages.

An abusively discharged employee who receives adequate compensatory damages is not automatically entitled to receive punitive damages. Unless the employer has an improper motive, the discharged employee has no cause of action; legal "malice" is an essential element of the tort. Courts should not permit the jury to award punitive damages unless the employee has shown that the employer acted with "actual malice,"[239] that is, conduct or a degree of culpability that goes far beyond what is necessary to establish the employee's prima facie case. For example, courts should allow punitive damages if the employer consciously violates a statute that protects personal rights of the employee,[240] or if he

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[235] *Id.*

[236] *See* Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982) (punitive damages in abusive discharge action is not available unless the defendant's conduct is wanton, willful, or malicious); *see also* Mallor, *supra* note 16, at 492-95.

[237] *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

[238] *Cf.* DOBBS, *supra* note 19, § 3.9, at 205 (stating that courts allow punitive damages where the tort is a dignitary invasion because there is little or no pecuniary loss but the courts recognize that the plaintiff is entitled to substantial damages).

[239] *See* Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

[240] *See id.* (punitive damages will have a deterrent effect if imposed on an employer who consciously and deliberately disregards a statute prohibiting the employer from requiring employees to take a lie detector test as a condition of employment).

aggravates the employee's harm by harassing him or actively interfering with the employee's ability to find a new job.[241] Punitive damages are also proper if the employer fired the employee because the employee refused to violate the law.[242] The courts ought to allow the jury to fully compensate the employee for the harm he has suffered, but only when the employer's conduct is particularly egregious is it proper for the courts to allow the jury to award damages based on the defendant's wealth instead of the plaintiff's harm.

V. Conclusion

Now that courts are recognizing that tort and contract law should limit the employment at will rule, they must also grant remedies that correspond to the substantive interests these new causes of action protect. When the courts face these remedies issues, they should give at least as much thought to these issues as they have given to the substantive issues. It is always tempting to apply an amorphous calculus of fairness to remedies problems or to forget that a substantive right is worth little more than the remedy the court permits for that right. When courts consider the remedies issues that are certain to arise, one hopes that they will have the courage to be creative and, above all, will focus on the fundamental principles of remedies law that have guided the courts for centuries. Among these is the principle that the remedy should correspond to the substantive interest the law is trying to protect. In order to determine the appropriate remedy, it is first necessary to identify that legally protected interest.

Ronald Weisenberger

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[241]Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 703 n.19 (W. Va. 1982).
[242]Mallor, *supra* note 16, at 495.

The Limitations Period for Title I of the LMRDA: Protection of the Union Member's Civil Rights

I. Introduction

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[1] was created in response to Congressional concern over growing internal union misconduct.[2] Title I, labelled the union member's "Bill of Rights," provides protection of individual union member rights

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[1]Labor Management Reporting and Disclosure Act (LMRDA) § 101, 29 U.S.C. § 411 (1982). The LMRDA is popularly known as the Landrum-Griffin Act. It provides in relevant part:

> (a)(1) Equal rights—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
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> (2) Freedom of speech and assembly—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings . . . .
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> (3) Dues, initiation fees, and assessments—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization . . . shall not be increased and no special assessment shall be levied upon such members . . . .
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> (4) Protection of right to sue—No labor organization shall limit the right of any member thereof to institute an action in any court . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . .
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> (5) Safeguards against improper disciplinary action—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Id.

[2]LMRDA § 101, 29 U.S.C. § 411 (1982); *See* S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959) *reprinted in* 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959*, at 398-401 (1959) [hereinafter Leg. Hist.]; *see also* Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley, 467 U.S. 526, 536 (1984); United Steelworkers v. Sadlowski, 457 U.S. 102, 109 (1982); Finnegan v. Leu, 456 U.S. 431, 435 (1982).

considered necessary for union democracy.[3] The Act is designed to guarantee every union member equal rights protection, freedom of speech and assembly, rights involving dues, initiation fees and assessments, protection of the right to sue and safeguards against improper disciplinary action.[4] The LMRDA also allows union members to seek redress in federal court when unions encroach upon those enunciated rights.[5]

Although Congress provided aggrieved union members with a private cause of action, it failed to enact a statute of limitations for these actions. This has led courts to apply various inconsistent statutes of limitations when confronted with Title I cases.[6] Given this diversity in the selection of limitations periods, the federally created right of a union member to file suit could be upheld or summarily denied, depending on the jurisdiction in which the action was instituted.

In 1983, the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*[7] applied a federal six-month statute of limitations to an action in which an employee sued his employer for breach of a collective bargaining agreement and his union for breach of the union's duty of fair representation.[8] This type of action is typically called a "301 hybrid."[9] As a result of *DelCostello*, some federal courts adopted the Supreme Court's reasoning and selected the same six-month statute of limitations for Title I cases.[10] Other courts have expressly refused to

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[3]Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Atleson, *A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 MINN. L. REV. 403 (1967); Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577 (1973); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960); *see supra* note 2.

[4]*See supra* note 2.

[5]LMRDA § 102, 29 U.S.C. § 412 (1982). The statute provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Id.

[6]*See infra* notes 35-51 and accompanying text.

[7]462 U.S. 151 (1983).

[8]*Id.* at 163.

[9]*See infra* notes 12-16 and accompanying text. *See also* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 165 (1983), Bowen v. United States Postal Serv., 459 U.S. 212, 235 (1983) (White J., dissenting); United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 66 (1980) (Stewart, J., concurring); Rogers v. Lockheed-Georgia Co., 720 F.2d 1247, 1249 (11th Cir. 1983); Storch v. International Bhd. of Teamsters, Local Union No. 600, 712 F.2d 1194, 1195 (7th Cir. 1983) (per curiam).

[10]*See infra* notes 67-73 and accompanying text.

apply the federal limitations period, thereby rejecting the analogy between 301 hybrids and Title I cases.[11]

Part II of this note analyzes the rights protected by statutes and reviews the treatment of Title I claims before and after the *DelCostello* decision. Part III discusses the balance between the interests in preserving the collective bargaining arrangement and the interest in preserving the union member's federally created rights in Title I claims in view of *DelCostello*. Part IV examines the various alternatives available to a Title I plaintiff. Part V concludes that courts should select state limitations periods for personal injury actions in the absence of Congressional direction.

II. Background of Court Treatment of LMRDA Claims

A. Characterization of Rights Protected by Statutes

In order to determine the effect of the *DelCostello* decision on Title I claims, it is necessary to examine the different types of actions that are involved in 301 hybrid and Title I suits. While 301 hybrid claims focus primarily on protecting a worker's economic rights, the Title I suit is designed to protect non-economic interests.

1. The 301 Hybrid—Protection of Economic Rights.—The Labor-Management Relation Act (LMRA) provides a process in which a worker can secure his or her economic rights through negotiations between a union and employer that culminate in a collective bargaining agreement.[12] Through use of grievance and arbitration proceedings, a typical agreement provides for private settlement of issues involving the worker's economic loss.[13] If these procedures fail, section 301 of the LMRA allows a union as representative of the employee to bring an action against an employer for breach of a collective bargaining agreement for the purpose of protecting the worker's economic interests.[14]

Although dispute settlement procedures will usually be final, a union member may further pursue his economic rights if the union has failed

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[11]*See infra* notes 74-84 and accompanying text.

[12]Labor Management Relations Act (LMRA) § 301, 29 U.S.C. § 185 (1982). *See also DelCostello*, 462 U.S. at 163.

[13]*DelCostello*, 462 U.S. 163.

[14]LMRA § 301(a), 29 U.S.C. § 185(a) (1982). The statute provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

to fairly represent the member in his grievance against the employer.[15] In this instance, the employee sues both the employer for breach of the collective bargaining agreement and the union for breach of its duty to fairly represent him.[16] This action, the 301 hybrid, provides the employee with an effective method to protect his economic interests in the employment context. Although an employee's complaint may not directly allege an economic loss through employer misconduct in every case, employer misconduct will likely have an economic effect because it affects the employee's livelihood at the very least indirectly.

2. Title I—Protection of Non-Economic Rights.—Unlike the 301 hybrid economic claims, Title I suits are viewed primarily as civil rights matters.[17] The basis of the 301 hybrid claim is the labor-management relationship; in contrast, the core of a Title I suit is the individual's interest in union democracy.[18] The Act was designed to protect the non-economic rights of the worker. The emphasis on civil rights is evidenced by the legislative history of the Act.

Enactment of the LMRDA stemmed from Congressional concern with widespread abuses of power by union leadership.[19] Allegations of union wrongdoing and apparent tensions between union leadership and its members prompted extended congressional inquiry.[20] The first leg-

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[15]There is no explicit statutory imposition of a duty of fair representation. Rather, the duty has judicially evolved as a way of ensuring that individual employees are not injured by a federal labor policy which condones collective representation of groups of employees by a single bargaining unit. *See DelCostello*, 462 U.S. at 163; Bowen v. United States Postal Serv., 459 U.S. 212 (1983); United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967); *see generally* R. GORMAN, BASIC TEXT ON LABOR LAW 695-728 (1976); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Grenig, *The Duty of Fair Representation: The Statute of Limitations in Fair Representation Cases*, 33 LAB. L.J. 483 (1982); Lehmann, *The Union's Duty of Fair Representation - Steele and Its Successors*, 30 FED. B.J. 280 (1971); Sachs & Gurewitz, *Union's Duty of Fair Representation*, 61 MICH. B.J. 526 (1982); Note, *A New Federal Statute of Limitations for Section 301/ Fair Representation Claims: Should It Have Retroactive Application?*, 12 FORDHAM U.L.J. 591 (1984); Note, *Fair Representation by a Union: A Federal Right in Need of a Federal Statute of Limitations*, 51 FORDHAM L. REV. 896 (1983); Note, *Statutes of Limitations When Section 301 and Fair Representation Claims are Joined: Must They be the Same?*, 49 FORDHAM L. REV. 1058 (1981); Note, *Statute of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer*, 44 GEO. WASH. L. REV. 418 (1976).

[16]*See supra* note 15.

[17]*See* Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986); Rodonich v. House Wreckers Union Local 95, 624 F. Supp. 678, 682 (S.D.N.Y. 1985); McQueen v. Maguire, 122 L.R.R.M. 2449 (S.D.N.Y. 1986).

[18]*See supra* note 2.

[19]*See supra* note 2.

[20]*See* Finnegan v. Leu, 456 U.S. 431, 435 (1982).

islation that was introduced focused on specific aspects of union affairs by establishing disclosure requirements and rules governing union trusteeships and elections.[21] Because legislators feared that the bill did not adequately protect union members who spoke against union leadership, they proposed various amendments aimed at enlarging protection for union members.[22]

Senator McClellan proposed the amendment he referred to as a "Bill of Rights" for union members. This amendment was the forerunner of Title I provisions designed to guarantee each union member equal voting rights, rights to free speech and assembly, and a right to sue.[23] He emphasized the civil rights aspect of the amendment when he stated that he hoped the amendment would "bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution of the United States."[24] He also said, "[T]he rights which I desire to have spelled out in the bill are not now defined in the bill. Such rights are basic. They ought to be basic to every person, and they are under the Constitution of the United States."[25] Other senators made similar statements regarding the bill of rights provision.[26] Representative Griffin stated, "These basic guarantees are hardly new or novel—they are essential and fundamental rights that every American citizen is guaranteed in the Bill of Rights of the Federal Constitution."[27]

The amendment ultimately enacted emphasized the rights of union members to freedom of expression without fear of union sanctions often as harsh as loss of union membership and resulting loss of livelihood.[28] Congress determined that such protection was essential in order to further

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[21]*Id. See also* United Steelworkers v. Sadlowski, 457 U.S. 102, 110 (1982). Senator McClellan introduced the original amendment on the floor of the Senate. The Senate adopted it by a vote of 47-46. 105 CONG. REC. 6469-6493 (1959), 2 Leg. Hist. 1096-1119. Senator Kuchel introduced a compromise version of the amendment which was substituted shortly thereafter. 105 CONG. REC. 6716-6727 (1959), 2 Leg. Hist. 1229-1239. This version was approved by the House of Representatives as part of the Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. 628-633.

[22]*See supra* note 21.

[23]105 CONG. REC. 6469-6493 (1959), 2 Leg. Hist. 1096-1119.

[24]105 CONG. REC. 6472 (1959), 2 Leg. Hist. 1098.

[25]105 CONG. REC. 6478 (1959), 2 Leg. Hist. 1104-1105.

[26]*See* 105 CONG. REC. 6483 (1959) (Senator Curtis); *id.* at 6488 (Senator Goldwater); *id.* at 6489 (Senator Mundt); *id.* at 6490 (Senator Dirksen); *id.* at 6726 (Senator Javits); 2 Leg. Hist. 1109, 1115, 1116, 1238.

[27]105 CONG. REC. 14, 193 (1959); *see also* Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley, 467 U.S. 526 (1984).

[28]*Finnegan*, 456 U.S. at 435. *See also supra* note 2-3.

the Act's primary goal of union democracy and union responsiveness to the union member's will.[29]

The history of the Act reveals that a Title I claim is primarily a civil rights matter, unlike a 301 hybrid suit that allows workers to remedy economic loss flowing from union acquiesence to management misconduct. Although Title I claims have economic implications, the emphasis of the act is protection of civil rights similar to those protected by the Federal Constitution rather than protection of economic rights such as those protected by the LMRA as well as the National Labor Relations Act (NLRA).[30]

B. Judicial Treatment of Title I cases Prior to DelCostello

Because Congress failed to enact a federal statute of limitations for Title I cases, it created a void which often occurs in federal labor legislation.[31] When Congress has remained silent on the issue of statutes of limitations, courts have generally concluded that Congress intended that a limitation period exist, due to policy considerations that are protected by use of limitations of actions.[32] In the absence of a federal statute of limitations, the established practice of courts has been to borrow or adopt the most suitable statute or rule from another source.[33] Typically, courts have determined that Congress intended that they should select the most similar limitations period under state law unless application

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[29]*Finnegan*, 456 U.S. at 435.

[30]National Labor Relations Act (NLRA), 29 U.S.C. § 158 (1982). *See also supra* note 17.

[31]*See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158 (1983); Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703 (1966).

[32]Wilson v. Garcia, 471 U.S. 261, 266 (1985); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 (1983); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); Runyon v. McCrary, 427 U.S. 160, 180-182 (1976); Chevron Oil Co. v. Huson, 404 U.S. 97, 101-105 (1971); Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703 (1966); Chattanooga Foundry v. Rankin, 197 U.S. 154, 158 (1905); Campbell v. Haverhill, 155 U.S. 610, 617 (1895).

[33]*See DelCostello*, 462 U.S. at 159. For general discussion and various approaches to statutes of limitations, see Mishkin, *The Variousness of "Federal Law": Competence and Discretion In the Choice of National and State Rules of Decision*, 105 U. PA. L. REV. 797, 810-814 (1957) (discusses factors which are relevant to federal courts' selection of state laws); Note, *Developments in Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, 1192-98 (1950) (discusses principles used by courts to select statutes of limitations for various actions); Note, *A Limitation On Actions For Deprivation of Federal Rights*, 68 COLUM. L. REV. 763, 764-68 (1968) (examines approaches to selection of limitations period where federal statute does not prescribe a specific period); Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1727 (1979); Note, *Federal Statutes Without Limitation Provisions*, 53 COLUM. L. REV. 68, 69-72 (1953).

of state law would be inconsistent with the federal policy underlying the pending action.[34]

Following this rationale, courts applied various state statutes of limitations when confronted with Title I claims. Some courts applied state statutes of limitations for contract violations.[35] In *Crowley v. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers*,[36] union members sued their union for a Title I violation, alleging that the union denied their rights to attend union meetings, to nominate candidates on an equal basis with other Local members and to speak freely on union business matters without reprisal. They also alleged union violations with respect to payment of dues. The court applied Massachusetts law and reasoned that because the essential nature of the plaintiffs' claim was contractual, the six-year statute of limitations for contract actions applied, rather than the three-year statute of limitations for tort violations.[37]

Other courts rejected the contract analogy, favoring the use of statutes of limitations for tort violations.[38] In *Sewell v. Grand Lodge of the International Association of Machinists and Aerospace Workers*,[39] the Fifth Circuit Court of Appeals held that an action against a union by a union representative alleging that he was wrongfully discharged by reason of having exercised his right to free speech and assembly was essentially in the nature of a tort; thus, the action for violation of his rights under Title I was barred by Alabama's one-year statute of limitations for tort violations.[40] In *Berard v. General Motors Corp.*,[41] the court used a tort limitations period by comparing the Title I claim to an action based on infringement of rights arising under the first amendment.[42]

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[34]*See supra* note 32.

[35]*See* Dantagnan v. I.L.A. Local 1418, 496 F.2d 400 (5th Cir. 1974); Crowley v. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers, 521 F. Supp. 614 (D. Mass. 1981), *aff'd*, 679 F.2d 978 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

[36]521 F. Supp. 614 (D. Mass. 1981), *aff'd*, 679 F.2d 978 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

[37]*Id.* at 631. Plaintiff's allegation that an increase in dues violated 29 U.S.C. § 411 (a)(3) was analogized to a quasi-contractual action because plaintiffs sought only declaratory relief.

[38]*See* Howard v. Aluminum Workers Int'l Union, 589 F.2d 771 (4th Cir. 1978): Sewell v. Grand Lodge of Int'l Ass'n of Machinists and Aerospace Workers, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); Berard v. General Motors Corp., 493 F. Supp. 1035 (D. Mass. 1980).

[39]445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).

[40]*Id.* at 550.

[41]493 F. Supp. 1035 (D. Mass. 1980), *cert. denied*, 451 U.S. 987 (1981).

[42]*Id.* at 1043.

In *Harrison v. American Federation of Labor and Congress of Industrial Organizations*,[43] the District Court for the Eastern District of Pennsylvania analogized a Title I claim by a former local president against his union for unlawful suspension and expulsion to the tort action for interference with business associational ties.[44] It applied a six-year statute of limitations applicable to "actions of trespass" and "upon the case."[45]

Still another court chose to use a state statute of limitations for liability created by statute, other than a penalty or forfeiture.[46] In *Copitas v. Retail Clerks International Association*,[47] the Ninth Circuit Court of Appeals held that the three-year limitations period for liability created by statute, other than penalty or forfeiture was most appropriate in a Title I claim.[48] The plaintiff in *Copitas* alleged that he was fired as business representative of the local union because he criticized those who managed the local union.[49]

As a result of the various characterizations made by courts regarding Title I claims, a wide disparity developed in the amount of time given to plaintiffs in order to file claims in different jurisdictions.[50] The amount

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[43]452 F. Supp. 102 (E.D. Pa. 1978).

[44]*Id.* at 106.

[45]*Id.* at 107. After the court drew the analogy to interference with business associational ties, it did not discuss in depth its reasoning for choosing a statute of limitations applicable to trespass actions. Rather, it simply referred to the reasoning in Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 899-903 (3d Cir. 1977), which involved a claim under the 1866 Civil Rights Act. The *Meyers* court rejected the analogy of a civil rights claim to a personal injury action and instead chose the statute which governed all actions in trespass not involving personal injury. *Id.*

[46]Copitas v. Retail Clerks Int'l Ass'n, 618 F.2d 1370 (9th Cir. 1980).

[47]618 F.2d 1370 (9th Cir. 1980).

[48]*Id.* at 1373. The court rejected the contract analogy promoted by the defendants. *Id.* at 1372. The court stated:

> We do not find appellant's claims under the LMRDA to be analogous to claims for relief based upon contract law. A given set of facts may give rise to a claim for relief under both contract law and the LMRDA, but the elements of the two are not the same. An essential element of an action under contract principles is the existence of an agreement between the parties. The existence of an agreement is not required to make out a claim under the LMRDA. In fact, the members rights and union obligations exist independently of any contractual provisions embodied in the union constitution or bylaws. The absence of a constitution or bylaws will not preclude a union member from enforcing his statutory rights. Nor does the lack of a constitution permit a union to ignore its statutory obligation to refrain from interfering with a member's exercise of his LMRDA rights.

Id.

[49]*Id.* at 1371.

[50]*See, e.g.*, Copitas v. Retail Clerks Int'l Ass'n, 618 F.2d 1370 (9th Cir. 1980) (three-

of time depended solely on how a court chose to characterize the claim. A plaintiff could not anticipate what the court would consider the most appropriate analogy to his particular set of circumstances.[51] This lack of consistency exemplified the need for some type of uniformity.

C. *The* DelCostello v. International Brotherhood of Teamsters *Decision*

In 1983, the Supreme Court addressed the same type of problem in *DelCostello v. International Brotherhood of Teamsters*[52] when it directly confronted the inconsistent application of statutes of limitations to 301 hybrid actions. In *DelCostello*, the court consolidated two cases, each of which involved an employee or employees who sued the employer for breach of a collective bargaining agreement and the union for breach of its duty of fair representation.[53] Because no federal statute of limitations expressly applied to these actions, the Supreme Court was asked to determine which statute of limitations should apply to such suits.[54] It held that the six-month limitations period contained in the National Labor Relations Act for filing unfair labor practice charges with the National Labor Relations Board[55] was the appropriate limitations period for employees' actions against the employer and union.[56]

The Court concluded that a borrowed state statute of limitations period for actions to vacate arbitration awards was not consistent with the underlying policies of section 301.[57] The Court's rejection was based on the idea that in a commercial arbitration setting, parties are expe-

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year period); Howard v. Aluminum Workers Int'l Union, 589 F.2d 771 (4th Cir. 1978) (two-year limitations period); Dantagnan v. I.L.A. Local 1418, 496 F.2d 401 (5th Cir. 1974) (ten-year period); Sewell v. Grand Lodge of Int'l Ass'n of Machinists and Aerospace Workers, 445 F.2d 545 (5th Cir. 1971); Crowley v. Local No. 82., Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers, 521 F. Supp. 614 (D.C. Mass. 1981), *aff'd*, 679 F.2d 978 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984) (six-year limitations period); Berard v. General Motors Corp., 493 F. Supp. 1035 (D. Mass. 1980) (three-year period).

[51]*See supra* note 50.

[52]462 U.S. 151 (1983).

[53]*Id.* at 155-156.

[54]*Id.*

[55]National Labor Relations Act (NLRA) § 10(b), 29 U.S.C. § 160(b) (1976). The statute provides in relevant part:

> Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

29 U.S.C. § 160(b) (1976).

[56]*DelCostello*, 462 U.S. at 169.

[57]*Id.*

rienced in matters of contract negotiation and business affairs.[58] Nevertheless, in the labor context, a worker will be prejudiced by his lack of knowledge and experience in labor matters. Moreover, the typical statute of limitations period for suits to vacate arbitration awards is unreasonably brief and preclusive, thereby failing "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine."[59]

Although the Court rejected the application of state statutes of limitations to 301 hybrid suits, it by no means totally rejected their use in other labor matters. Instead, the Supreme Court acknowledged its previous endorsement of the selection of a six-year period from state law to a union suit against an employer only for breach of a collective bargaining agreement in *Auto Workers v. Hoosier Cardinal Corp.*[60] Although labor-management relations, which is ordinarily an area in need of uniformity, was the issue in *Hoosier*, the Court stated:

> [N]ational uniformity is of less importance when the case does not involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it."[61]

The Court further observed that although use of state law may be objectionable for various reasons, it should be tolerated if there was no express federal limitations period "designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state law parallels."[62] Drawing an analogy between 301 hybrid suits and charges brought under the NLRA, the Court found substantial similarities between unfair labor practices, union breaches of fair representation and employer breaches of collective bargaining agreements.[63] It also empha-

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[58]*Id.* at 166-67.

[59]*Id.* at 167-68.

[60]*Id.* at 162 (citing Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)).

[61]*Id.* at 162 (quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)).

[62]*Id.* at 169-70. Justice Brennan discussed Justice Stevens' suggestion in United Parcel Service, Inc. v. Mitchell, that in a claim against the union, the state limitations period for legal malpractice should be applied. *DelCostello*, 462 U.S. at 167 (citing *Mitchell*, 451 U.S. 72-75 (Stevens, J., concurring in part and dissenting in part)). Justice Brennan rejected this approach, stating that an aggrieved employee would still be required to file his action against the employer in a timely manner in order to secure relief. *Id.* at 168. Moreover, a lengthy time bar would continue to undermine "the relatively rapid final resolution of labor disputes favored by federal law . . . . " *Id.* at 168.

[63]*Id.* at 170. The Court noted, "Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap." *Id.*

sized the strong similarities between underlying considerations of unfair labor practice charges and 301 hybrid actions—" 'stable bargaining relationships and finality of private settlements.' "[64] The Court concluded that because an express federal limitations period existed that accommodated the balance of interests at stake, there was no need to apply state law.[65]

Although the Supreme Court departed from the general practice of borrowing state limitations periods, it stressed that its holding did not signal a departure from the general borrowing norm; it merely carved out a narrow exception to the norm in the 301 hybrid context.[66] The Court stated:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods any time state law fails to provide a perfect analogy . . . . On the contrary, as the courts have often discovered, there is not always an obvious state law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing limitations periods.[67]

Thus the Court condoned a flexible approach and cautioned future courts not to interpret its holding as advocating a practice of uniformly applying federal limitations periods whenever state law did not provide a precise analogy to the pending action.

D. Judicial Reaction to DelCostello *in Title I Cases*

Some federal courts have failed to heed the Supreme Court's words of caution by inappropriately applying the six-month statute of limitations to Title I actions.[68] Courts have analogized the economic interests at stake in a 301 hybrid suit to the civil rights type interests of Title I cases in order to uniformly apply the six-month period applied in *DelCostello*.

Although some federal courts have ignored *DelCostello* or have not yet addressed *DelCostello*'s applicability to Title I cases,[69] a widening number of courts have used the *DelCostello* decision as a springboard

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[64]*Id.* at 171 (quoting *Mitchell*, 451 U.S. at 70-71 (Stewart, J., concurring)).
[65]*Id.* at 169.
[66]*Id.* at 171-172.
[67]*Id.* at 171.
[68]*See infra* note 70 and accompanying text.
[69]*See, e.g.*, Taschner v. Hill, 589 F. Supp. 127 (E.D. Pa. 1984).

for application of the six-month limitations period.[70] In *Local Union 1397, United Steelworkers v. United Steelworkers*, a local union and its officers, after being targeted for union disciplinary action, sued the national union for violation of their due process rights, as protected by section 101(a)(5) of the LMRDA.[71] The Third Circuit Court of Appeals held that the six-month period endorsed in *DelCostello* was the most appropriate limitations period for Title I claims.[72] The Court applied the Supreme Court's reasoning in *DelCostello* and found that Title I claims resembled 301 hybrid claims so closely that the federal statute of limitations was more appropriate than state law.[73]

Similarly, in *Davis v. UAW*,[74] a union member's action under Title I was barred by the six-month statute of limitations borrowed from section 10(b) of NLRA.[75] In *Davis*, the union member alleged that he was expelled from his union in retaliation for exercising his statutory right of free speech protected under Title I. Although the Eleventh Circuit Court of Appeals was not quite as convinced of the similarities between Title I actions and 301 hybrid actions, it stated that it felt "constrained by the analysis employed in *DelCostello* to apply the same limitations period to the present lawsuit."[76]

Other federal courts have not felt bound to follow *DelCostello*.[77] Indeed, they have expressly rejected the use of the six-month period and asserted that the federal limitations period is inappropriate in the Title

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[70]*See* Davis v. UAW, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986); Local Union 1397, United Steelworkers v. United Steelworkers, 748 F.2d 180 (3d Cir. 1984); Vallone v. Local Union No. 705, Int'l Bhd. of Teamsters, 755 F.2d 520 (7th Cir. 1984); Gordon v. Winpisinger, 630 F. Supp. 1276 (E.D.N.Y. 1986); McConnell v. Chauffeurs, Teamsters and Helpers Local 445, 606 F. Supp. 460 (S.D.N.Y. 1985); Turco v. Local Lodge No. 5, Int'l Bhd. of Boilermakers, 592 F. Supp. 1293 (E.D.N.Y. 1984).

[71]748 F.2d 180 (3d Cir. 1984). *See also supra* note 1.

[72]*Id.* at 184. The court rejected its previous practice of borrowing the state statute of limitations for interference with business associational ties. *Id.*

[73]*Id.*

[74]765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986).

[75]*Id.* at 1515.

[76]*Id.* at 1514. The court stated:

> In *DelCostello*, the Supreme Court found a strong connection between the national interest in labor peace and the necessity of a short time period in which to bring an action based on a labor union's duty of fair representation to its members. We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights.

Id.

[77]*See* Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986); Rector v. Local Union No. 10, Int'l Union of Elevator Constructors, 625 F. Supp. 174 (D. Md. 1985); Rodonich v. House Wreckers Union Local 96, 624 F. Supp. 678, 682 (S.D.N.Y. 1985); McQueen v Maguire, 122 L.R.R.M. 2449 (S.D.N.Y. 1986).

I context.[78] In *Rector v. Local Union No. 10, International Union of Elevator Constructors*,[79] a union member alleged that he was expelled from his union for non-payment of dues in violation of Title I. He claimed that he relied on a union representative's assurances that payment was not necessary and that the representative knew he would rely on those representations.

In *Rector*, the District Court of Maryland rejected the *DelCostello* application to Title I cases and chose instead a state three-year statute of limitations for contract actions.[80] The court analyzed the *DelCostello* decision in view of Title I claims and rejected analogies drawn by courts that adopted the six-month period.[81] The court concluded that plaintiff's claim resembled an action for promissory estoppel, thus making the contract period appropriate.[82]

In *Doty v. Sewall*,[83] a union member sued two local unions under Title I. He charged that he was denied membership because of his active opposition to union actions and policies. The First Circuit Court of Appeals held that the Massachusetts civil rights statute, rather than the NLRA, was the appropriate source of limitations period.[84]

The *Doty* court reasoned that Title I claims are analogous to civil rights actions; therefore, the appropriate limitations period would be that used for the state civil rights statute.[85] The court observed that civil rights actions essentially state a claim lying in tort; thus, the three-year state statute of limitations for tort actions applied.[86] It further noted that the Supreme Court approved the use of tort statutes of limitations in civil rights actions in *Wilson v. Garcia*.[87] In *Wilson*, the plaintiff sued a police officer and chief of state police under the Civil Rights Act of 1871. The Supreme Court found that these types of actions are best characterized as personal injury actions, and held that all civil rights suits brought under section 1983 should be governed by state statutes of limitations for personal injury actions.[88]

As shown, courts have used a variety of limitations periods based on their characterization of each plaintiff's particular circumstances in

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[78]*See supra* note 74.

[79]625 F. Supp. 174, 174-75 (D. Md. 1985).

[80]*Id.* at 179.

[81]*Id.* at 177-79.

[82]*Id.* at 179.

[83]784 F.2d 1 (1st Cir. 1986).

[84]*Id.* at 8.

[85]*Id.* at 11.

[86]*Id.*

[87]*Id.* (citing Wilson v. Garcia, 471 U.S. 261 (1985)).

[88]*Wilson*, 471 U.S. 261, 276-80 (1985). For a detailed discussion, see *infra* notes 172-193 and accompanying text.

Title I cases despite the fact that each claim arose under the same statute.[89] In an effort to provide some consistency in this area, some courts used the *DelCostello* decision as a springboard for uniform application of the federal six-month limitations period.[90] Yet, other courts have rejected this logic as flawed and have instead continued to select similar state statutes of limitations.[91]

III. Analysis of Title I Claims In Light of *DelCostello*: The Balance of Interests

In *DelCostello*, the Supreme Court determined that the federal six-month statute of limitations was appropriate because it created a proper balance "between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system."[92] As in *DelCostello*, the relevant interests and policies must be balanced to determine whether the federal limitations period is also appropriate in Title I cases.

A. Impact on Collective Bargaining Agreements

Title I claims do not arise from the labor-management relationship. They arise out of the union member's relationship with his union; thus these suits do not implicate the collective bargaining process in the same manner as 301 hybrid claims.[93] Because Title I claims are concerned with internal operation and discrimination by unions,[94] they affect slightly, if at all, the union's bargaining relationship with the employer.[95]

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[89]*See supra* notes 35-51 and accompanying text.

[90]*See supra* notes 70-76 and accompanying text.

[91]*See supra* notes 77-86 and accompanying text.

[92]*DelCostello*, 462 U.S. at 171 (quoting *Mitchell*, 451 U.S. at 70 (Stewart, J., concurring)). The court further stated:

> That is precisely the balance at issue in this case. The employee's interest in setting aside the "final and binding" determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates "those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it."

Id. (quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)).

[93]*See Doty*, 784 F.2d at 6-7; *Rodonich*, 624 F. Supp. at 682. *See also supra* notes 23-29.

[94]*Doty*, 784 F.2d at 7. Types of discrimination which may occur within the union include depriving an individual of the right to vote on certain union matters, refusing access to records and books, disciplining or expelling a union member without due process or in retaliation for protected speech activities.

[95]*Id.*

Unlike Title I suits, 301 hybrid claims directly challenge the grievance/arbitration mechanism in the collective bargaining agreement.[96] The union member's claim in a 301 hybrid relates to matters directly affecting the employment relationship.[97] Although an employee may sue a union in an action which does not directly implicate the employment relationship under the NLRA,[98] the nexus between unfair labor practices and Title I claims is minimal.[99] Section 8(b)(1)(A) of the NLRA allows an employee to sue a union for unfair labor practices, which may include actions outside the employment relationship.[100] Nevertheless, the mere existence of an overlap between section 158(b)(1)(A) and Title I does not establish that Title I and the NLRA share the same underlying interests.[101]

In *Doty v. Sewall*, the First Circuit Court of Appeals discussed the difference in focus between the Title I claims and 301 hybrid suits.[102] It then noted numerous obvious differences between the two types of suits:

> A Title I suit cannot be brought against the employer. It in no way challenges the "stable relationship" between the employer and the union. It does not affect any interpretation or effect any reinterpretation of the collective bargaining agreement and so, unlike the hybrid actions, a Title I claim does not attack a compromise between labor and management. Moreover, another factor in the *DelCostello* equation is lacking. There is no erosion of the finality of private settlements, for in free standing LMRDA cases the union member is not attempting to attack any such settlement. As in *Auto Workers v. Hoosier Cardinal Corp.*, this case does not involve either "'the formation of the collective agreement [or] the private settlement of disputes under it.'"[103]

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[96]*Rodonich*, 624 F. Supp. at 682. *See also supra* notes 12-16 and accompanying text.

[97]*See DelCostello*, 462 U.S. at 170; *see also* R. GORMAN, BASIC TEXT ON LABOR LAW 699-701 (1976).

[98]NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1982). The statute provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

29 U.S.C. § 158(b)(1)(A).

[99]*Doty*, 784 F.2d at 7.

[100]*See supra* note 98. *See also Doty*, 784 F.2d at 7.

[101]*Doty*, 784 F.2d at 7.

[102]*Id.*

[103]*Id.* at 7 (quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)).

In *Rector v. Local Union No. 10, International Union of Elevator Constructors*,[104] the District Court of Maryland acknowledged that although LMRDA claims may divert resources of a union due to litigation costs, which in turn may reduce its effectiveness in the collective bargaining process, the Title I claim rarely affects the strength of a union as a bargaining unit.[105] It further noted that Title I actions cannot overturn union certification election results, nor overturn elections of union officials.[106]

As *Doty* and *Rector* indicate, Title I claims have little, if any, impact on the interests in stable labor-management relationships and finality in privately grieved and arbitrated settlements.[107] In *DelCostello*, the Supreme Court's emphasis on the strong collective bargaining interests at stake prompted it to select the federal limitations period.[108] The absence of this vital factor in Title I claims implies that the six-month limitations period is inappropriate.

B. Impact on Union Member's Interest

Unlike 301 hybrid claims which focus on the labor-management relationship rather than any specified, individualized right, Title I suits concentrate on interests of the union member. Based upon a national policy of protection of individual rights, Title I specifically identifies and seeks to protect these fundamental rights in the union context.[109] The legislative history of the LMRDA illustrates the emphasis on rights similar to those protected by the Federal Bill of Rights.[110] The parallels between the Federal Bill of Rights and the union member's "Bill of Rights" causes the Title I claim to resemble a civil rights action.[111]

In *Doty*, the court also examined the legislative history and concluded that the union member's interests were the primary consideration of Congress when it created the Act.[112] After analogizing Title I claims to civil rights matters, the court also noted that the legislative history supported the conclusion that Congress intended to give union members

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[104]625 F. Supp. 174 (D. Md. 1985).

[105]*Id.* at 178.

[106]*Id.*

[107]*Id.*; *Doty*, 784 F.2d at 7.

[108]462 U.S. 151, 169 (1983).

[109]*See supra* notes 2, 3, 23-26 and accompanying text.

[110]*See supra* notes 2, 3, 23-26 and accompanying text.

[111]Doty v. Sewall, 784 F.2d 1, 7 (1st Cir. 1986); Rodonich v. House Wreckers Union Local 95, 624 F. Supp. 678, 681 (S.D.N.Y. 1985); Bernard v. Delivery Drivers, 587 F. Supp. 524, 525 (D. Colo. 1984).

[112]*Doty*, 784 F.2d at 8.

a period longer than six months to file suit.[113] The bill was originally introduced in the Senate with a three-month period for exhaustion of internal procedures with a union.[114] The Senate changed the period to six months and returned it to the House.[115] In the House, legislators expressed concern that union members who used the full six months to exhaust remedies would be barred from bringing NLRA claims at the end of the period due to the NLRA's six-month statute of limitations.[116] The period was finally reduced to four months.[117]

The *Doty* court found no indication of similar concern about union members losing their Title I suits because of a time bar.[118] Although the court recognized that this history did not illustrate an express intent that the period for Title I suits be longer, it did conclude that the history supported the argument that Congress expected that union members would be given more time to file suits.[119]

The practical problems faced by the union member in bringing a Title I suit, as opposed to an unfair labor practice claim, also illustrate the adverse impact a short statute of limitations could have on the union member's interest. In *DelCostello*, the Supreme Court expressed concern about the practical difficulties faced by an employee in bringing a 301 hybrid suit.[120] The Court noted the difficulties an employee may have in evaluating the adequacy of union representation, retaining counsel and investigating a 301 hybrid claim.[121] Because the focus of Title I claims is primarily on the union member's interests, the practical obstacles which concerned the *DelCostello* Court become magnified when considered in the Title I context.

Procedurally, the union member faces more difficulty in filing a Title I suit than in filing an unfair labor practice charge.[122] When filing

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[113]*Id.* The court also noted:

> We also see some significance in the fact that Title IV of the LMRDA, 29 U.S.C. § 482, set a short time for resolving issues concerning the election and removal of union officers—a three-month internal exhaustion period, a member's complaint within one month thereafter, and a suit by the Secretary of Labor within the next 60 days. There is an obvious need for dispatch in resolving a question of union leadership. The fact that Congress acted in this instance suggests that its silence as to Title I implies a lack of special concern about expedition.

Id. at 8 n.7.

[114]*Doty*, 784 F.2d at 8 (citing 105 CONG. REC. 5,810 (1959)).

[115]*Id.* (citing 105 CONG. REC. 9,108 (1959)).

[116]*Id.* (citing 105 CONG. REC. 13,880 (1959)).

[117]*See supra* note 1.

[118]*Doty*, 784 F.2d at 8.

[119]*Id.*

[120]DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 165-166 (1983).

[121]*Id.*

[122]*Doty*, 784 F.2d at 8.

an unfair labor practice charge, the employee merely needs to file a one-page charge form with the NLRB.[123] In contrast, Title I claims are civil actions filed directly in federal court.[124] Thus, Title I actions are subject to the Federal Rules of Civil Procedure, which would be totally unknown to most union members.

Aside from these procedural difficulties, the initial obstacle faced by a union member is the lack of awareness that a violation of his Title I rights has occurred. Many violations are subtle and not easily detectable.[125] A union member may realize that his union is acting unfairly; however, he may not know that it is acting illegally.

Assuming that a union member does realize that his rights have been violated by the union, he may be deterred from pursuing his claim by the risks of suing his union. The typical Title I case involves a union member who has lost his membership status but wishes to remain a member.[126] In contrast, the employee suing under an unfair labor practice claim ordinarily wants the court to restore economic benefits directly related to his job with the employer.[127] In the Title I context, a member may be hesitant to sue co-workers and superiors who could affect his future fate, even if he is successful.[128] A member may feel that suing his union would have not only financial risks, but also risks to health and family due to an idea among some union members that union officers have legal and illegal means of "taking care" of a troublesome union member.[129]

Even if the union member does decide to sue, he still faces the pressures of collecting facts and retaining an attorney. This could be a substantial burden since the worker is probably totally unfamiliar with the law and has little, if any, contact with attorneys.[130] Already confronted with the burden of challenging a union to which he may have very strong ties, a worker may be hesitant to involve himself with legal proceedings.[131] If he does wish to pursue his claim, he could face

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[123]*Id.* at 8-9.

[124]*See supra* note 5.

[125]*Doty*, 784 F.2d at 8-9.

[126]*See Doty*, 784 F.2d 1 (1st Cir. 1986) (denial of union membership); Davis v. UAW, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986) (expulsion from union); Local Union 1397, United Steelworkers v. United Steelworkers, 748 F.2d 180 (3d Cir. 1984) (imposition of disciplinary action); Gordon v. Winpisinger, 630 F. Supp. 1276 (E.D.N.Y. 1986) (imposition of disciplinary action); Rodonich v. House Wreckers Union Local 95, 624 F. Supp. 678 (S.D.N.Y. 1985) (imposition of disciplinary action).

[127]*See supra* text accompanying notes 12-16.

[128]*Doty*, 784 F.2d at 9.

[129]*See* Atleson, *A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 MINN. L. REV. 403, 489 (1967) [hereinafter Atleson].

[130]*See id.* 488-89.

[131]*See id.*

overwhelming litigation costs. Moreover, lawyers may decline these claims if there is little chance for compensation.[132]

These practical problems faced by the union member are relevant when weighing the union member's interests because they affect the time it takes to make a decision to sue the union. Given the many obstacles the union member faces, it is clear that he is not likely to make the decision lightly or quickly. This suggests that a very short limitations period would not give the union member adequate time in which to make a decision even if he is aware of possible union misconduct.

When the interests of the union member are weighed against the interests in preserving the collective bargaining process in Title I cases, the balance tilts in favor of protecting the union member's vital rights.[133] This contrasts to 301 hybrid claims which emphasize the collective bargaining arrangement. The Title I claim does not impinge on labor-management relationships or the finality of private settlements. Furthermore, the importance of the interests protected by Title I makes limiting these suits without a compelling reason inappropriate.[134]

IV. An Analysis of Various Statute of Limitations Alternatives

A. Enactment of an Express Statute of Limitations

Congressional enactment would provide the best means for determining Congress' intent when it enacted Title I; however, the Act has remained substantially unaltered since enactment in 1959. Thus, the possibility that Congress will expressly adopt a statute of limitations is remote.[135]

B. Federal Six-Month Statute of Limitations

The federal six-month statute of limitations has been adopted by a growing number of federal courts.[136] Nevertheless, its use is inappropriate in Title I actions. Such a short period of time within which to bring an action under LMRDA thwarts Congressional purpose and procedurally disposes of otherwise meritorious claims. Reasons used to support adoption of the federal limitations period do not properly address the interests at stake in a Title I claim. Rather, policy considerations and practical problems illustrate the inappropriateness of the six-month period.

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[132]*Id.*

[133]*Doty*, 784 F.2d at 9.

[134]*Id.*

[135]*See supra* notes 1, 2, and 5 and accompanying text.

[136]*See supra* note 70.

In *Local Union 1397 v. United Steelworkers*,[137] the Third Circuit Court of Appeals stated that Title I suits bear a "family resemblance" to unfair labor practice charges because both actions are concerned with protecting individual workers from arbitrary action by unions.[138] It refused to distinguish "internal" Title I concerns such as ensuring a union member's freedom to speak against union leadership from an "external" NLRA based claim such as processing of grievances.[139] In an effort to find similarities between Title I claims and unfair labor practice claims, the court unduly emphasized only one part of the *DelCostello* opinion.[140] The conclusion that the NLRA and LMRDA bear a "family resemblance" simply because they both seek to protect workers from unfair treatment ignores the policy considerations relating to the balance of interests emphasized in *DelCostello* and its relationship to the facts of that particular case.[141]

The First Circuit, in *Doty*, further uncovered the flaws of the "family resemblance" analysis.[142] The *Doty* court rejected the nexus between the two types of claims and further stated, "[T]he fact that some day, in some ways, a plaintiff's claim may affect collective bargaining falls short of the nexus required to invoke 'family resemblance' reasoning."[143]

Even the Eleventh Circuit, in *Davis v. UAW*,[144] recognized the important distinction between Title I claims and the 301 hybrid situation in *DelCostello*.[145] Although the *Davis* court felt constrained to adopt the six-month limitations period, it noted that Title I cases involve a different balance of interests than 301 hybrids.[146] The court acknowledged that the union member's interest in protecting against the infringement

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[137]*Local Union 1397*, 748 F.2d 180 (3d Cir. 1984).

[138]*Id.* at 183.

[139]*Id. See supra* note 93-108 and accompanying text.

[140]748 F.2d at 183.

[141]*Doty*, 784 F.2d at 10; *Rector*, 625 F. Supp. at 179. In *Rector*, the court discussed the "family resemblance" argument:

> It is true that plaintiff's claims might also be characterized as an "unfair labor practice". But here defendant's "family resemblance" argument proves too much; virtually all LMRDA claims and § 185 claims against unions could be characterized the same way. Applying defendant's argument to its logical extreme, defendant is arguing that the "family resemblance" language in *DelCostello* supports a uniform six-month limitations period for all lawsuits against unions by their members.

625 F. Supp. at 179.

[142]*Doty*, 784 F.2d at 10.

[143]*Id.* The court noted that *Local Union 1397* overlooks the fact that *DelCostello* did not overrule *Auto Workers*.

[144]765 F.2d 1510 (11th Cir. 1985).

[145]*Id.* at 1514.

[146]*Id.*

of his rights of free speech was of greater importance than an employer's interest in setting aside an individual settlement under a collective bargaining agreement.[147]

In addition to finding a "family resemblance" between Title I cases and 301 hybrid actions, the *Local 1397* court concluded that a similarity in policy considerations between Title I claims and unfair labor practice charges dictated use of the six-month limitations period.[148] It reasoned:

> [R]apid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissention within a union naturally affects that union's activities and effectiveness in the collective bargaining arena.[149]

This reasoning has been rejected in subsequent Title I cases.[150] Indeed, even the *Davis* court found this analysis rather weak.[151] In *Rector*, the court stated, "Federal labor law should not be procedurally determined to resolve LMRDA claims quickly in a vain attempt to protect unions from diversity. Congress had precisely the opposite intent in mind when it wrote the LMRDA."[152] The federal interest in speedy resolutions of disputes should not preclude consideration of important issues raised by a Title I claim.

Aside from policy issues raised as a result of use of the six-month statute of limitations, practical difficulties also exist which encourage the use of a longer limitations period. This short period could easily create a "Catch-22" situation for a union member who is required to exhaust internal remedies before filing suit in federal court.[153] An action under section 101 accrues when a union member discovers, or in the exercise of reasonable diligence should have discovered, the alleged mis-

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[147]*Id.*

[148]Local Union 1397 v. United Steel Workers, 748 F.2d at 182 (3d Cir. 1984).

[149]*Id.* at 184.

[150]*See Doty*, 784 F.2d at 9; McQueen v. Maguire, 122 L.R.R.M. 2449, 2453 (S.D.N.Y. 1986) ("a very short limitations period [for Title I claims] would be justified only in the face of a [sic] overwhelming national interest in speedy resolution of the dispute"); Rodonich v. House Wreckers Union Local 95, 624 F. Supp. 678, 682 (S.D.N.Y. 1985) ("Although the rapid resolution of labor disputes serves an important national policy, its urgency is not so great when the result of applying the six-month statute might be to thwart the Congressional purpose in enacting the LMRDA, which was to provide union members with a 'bill of rights'").

[151]Davis v. UAW, 765 F.2d 1510, 1514 n.11 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986). The court noted, "This link appears rather tenuous in the situation of a single dispute between an individual union member and the union." *Id.*

[152]*Rector*, 625 F. Supp. at 178.

[153]*See supra* note 1. *See also Davis*, 765 F.2d at 1515 n.13.

treatment by the union.[154] Under section 101(a)(4), a union member may be required to exhaust reasonable internal union procedures before suing under section 102.[155] This creates a situation in which the union member's suit could be barred if he waits to sue for more than six months while trying to exhaust union procedures. However, his claim also could be dismissed for failure to exhaust internal remedies if he files within the limitations period without first following that course.[156]

A trial judge may exercise discretion and allow the plaintiff union member to forego the exhaustion procedure after an analysis of whether the available union remedies are adequate and reasonable under the particular circumstances of a case.[157] Nevertheless, the union member is still at great risk of being denied his rights because the limitations period is short and the period for processing internal grievances can last up to four months. Furthermore, this situation could easily occur often due to the brief period open to the plaintiff to sue.

Contributing to the "Catch-22" problem is the fact that unlawful activity by the union is often latent.[158] Title I violations often involve non-open, non-obvious denials of membership which could be perceived only gradually by the union member.[159] As stated previously, a Title I claim accrues upon discovery of the alleged misconduct.[160] If courts using the federal statute of limitations decide to read the statutory language literally instead of following the discovery principle, they will construe the statute to begin running when the illegal act occurs.[161] This means that the time in which a union member is allowed to sue will be even further reduced.

Moreover, a union member may find his suit barred due to a lack of notice of union procedures for exhausting union remedies. If a union

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[154]Vallone v. Local Union No. 705, Int'l Bhd. of Teamsters, 755 F.2d 520, 522 (7th Cir. 1984); Erkins v. United Steelworkers, 723 F.2d 837, 839 (11th Cir. 1984); Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961), *cert. denied* 366 U.S. 929 (1961); Clayton v. International Union, UAW, 451 U.S. 679 (1981); NLRB v. Industrial Union of Marine Workers, 391 U.S. 418 (1968).

[155]*See supra* notes 1 and 3.

[156]*Davis*, 765 F.2d at 1515. The *Davis* court noted two possible solutions to the "Catch-22" problem. It stated:

> First the limitations period might be tolled during the time a union member is exhausting his union remedies. . . . Second, a court could require the filing of the lawsuit within six months, but stay the judicial proceedings pending completion of exhaustion of union remedies.

Id. at 1515 n.13.

[157]*See supra* note 154.

[158]*See supra* note 115.

[159]*Doty*, 784 F.2d at 10. *See also supra* note 115.

[160]*Davis*, 765 F.2d at 1515.

[161]*See supra* notes 1 and 3.

member suspects mistreatment by his union, he may be unaware of the procedures necessary to exhaust internal remedies or unaware of the illegality of the union's conduct. If a union does not respond immediately to his inquiries or requests for those procedural guidelines, it may effectively bar the member's claim. Thus, a short period may not only deprive a member of his nationally recognized rights, it could encourage unions to deny members access to information needed to determine whether he should file suit.

C. Application of Analogous State Statutes of Limitations

The norm of using an appropriate state statute of limitations in the absence of Congressional enactment in the Title I area adheres to the traditional notion that when Congress is silent, it intends that courts should borrow analogous state limitations periods.[162] This practice, however, has caused a great deal of confusion and inconsistency.[163] Given the diversity in the selection of limitations periods, the union member's Title I suit could be granted or summarily denied, depending on the jurisdiction in which the action was instituted.

If courts were to continue following this tradition, they would ignore valid concerns raised by cases following *DelCostello* and thwart Congressional purpose.[164] Title I claims would continue to be analogized to widely variant state actions.[165] Characterization in such a variety of ways would still unfairly limit union members' rights or could unduly expose defendants to liability for a very long time, thereby defeating the labor policy of quick resolutions and peaceful settlements of labor claims.[166]

D. Application of Personal Injury State Statute of Limitations

Of those courts that rejected the federal six-month statute of limitations, many chose a personal injury limitations period instead.[167] These courts analogized the Title I claim to a civil rights matter and used the *Wilson v. Garcia*[168] opinion as a guide for selecting the personal injury period.[169] In that case, the Supreme Court instructed lower courts to

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[162]*See supra* notes 32-33.

[163]*See supra* notes 31-34 and accompanying text.

[164]*See supra* notes 6-7.

[165]*See supra* notes 70 and 77 and accompanying text.

[166]*See, e.g.*, Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986) (tort); Local Union 1397, United Steelworkers v. United Steelworkers, 748 F.2d 180 (3d Cir. 1984) (unfair labor practice); Rector v. Local Union No. 10, Int'l Union of Elevator Constructors, 625 F. Supp. 174 (D. Md. 1985) (contract).

[167]*See supra* note 77.

[168]471 U.S. 261 (1985).

[169]*See supra* note 86-88.

use state limitations periods for personal injury suits in civil rights matters brought under section 1983.[170] To determine whether courts have selected the most appropriate limitations period, it is necessary to examine the *Wilson* decision and its application to Title I cases.

1. The Wilson v. Garcia *Decision.*—In *Wilson v. Garcia*,[171] the respondent brought an action under section 1983 against a New Mexico state police officer and chief of state police. He alleged that he was unlawfully arrested and beaten viciously by the officer; therefore, he was entitled to damages caused by the deprivation of his constitutional rights.[172] The Supreme Court held that section 1983 civil rights claims "are best characterized as personal injury actions."[173] It endorsed the choice of a state statute of limitations applicable to personal injury actions.[174]

The Supreme Court used an analysis similar to *DelCostello*[175] in reaching its conclusion. It followed the same method of determining how to find an appropriate limitations period.[176] Like *DelCostello*, the Court first explained that in the absence of an express federal statute of limitations, it should consider whether any state limitations period is appropriate in view of the predominance of the federal interests involved.[177] The Court discussed *DelCostello* and noted the similarity in the "federal interest in uniformity and the interest in having 'firmly defined, easily applied rules.'"[178] Unlike *DelCostello*, however, the *Wilson* Court found a close analogy to state rather than federal law.[179] Since the Court found an analogy to state law that was consistent with the federal policies involved, it did not need to search for an analogous federal statute of limitations.

The *Wilson* Court examined the purpose of the Act and found that a broad characterization of section 1983 claims fit the statute's remedial purpose.[180] The Court explained its conclusion by noting the practical problems that arise when a choice of statutes of limitations depends on

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[170]*Wilson*, 471 U.S. 261, 269 (1985).

[171]*Id.* at 263.

[172]*Id.*

[173]*Id.* at 280.

[174]*Id.*

[175]DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983).

[176]*Wilson*, 471 U.S. at 266-67.

[177]*Id.* The Court noted that it had generally recognized that the problem of characterization "is ultimately a question of federal law." *Id.* at 270 (citing Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966)).

[178]*Id.* at 270 (citing Chardon v. Fumero Soto, 462 U.S. 650 (1983) (Rehnquist, J., dissenting)).

[179]*Id.* at 271-72.

[180]*Id.* at 272.

characterization of particular facts or legal theories.[181] The Court clearly rejected the practice of choosing a state statute of limitations according to the particular facts or legal theories involved.[182] It stated:

> The experience of the courts that have predicted their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purpose of § 1983. Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations.[183]

The Court further stated that the legislative history of the Act supported the conclusion that Congressional intent would be thwarted by uncertainty and confusion wrought by application of diverse statutes of limitations.[184]

The Court concluded that federal interests in uniformity, certainty, and reduction of unnecessary litigation were all served by choice of a state statute of limitations.[185] It stated that "[U]niformity within each State is entirely consistent with the borrowing principles contained in § 1988."[186] It chose a tort action for recovery of damages for personal injuries as the best alternative because this was the closest analogy to civil rights claims.[187] The Court rejected lower courts' analogies to claims such as those for breach of contract or for damages to property, stating that congressional intent supported the analogy of a section 1983 claim to a tort claim for personal injury.[188]

In endorsing the personal injury limitations period, the Court analyzed the nature of the section 1983 remedy and the federal interest in ensuring that the borrowed limitations period does not discriminate against the federal civil rights remedy.[189] This is similar to the *DelCostello*

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[181] *Id.* at 272-75. This is currently the method used by courts in Title I cases.

[182] *Id.* at 279. The Court stated, "Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights." *Id.*

[183] *Id.* at 272-73. The Court stated:

> If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim.

Id. at 273-74.

[184] *Id.* at 275.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 276.

[188] *Id.* at 273, 277.

[189] *Id.* at 276.

Court's analysis of the nature of the interests involved in 301 hybrid claims.[190]

The *Wilson* Court also noted that section 1983 merely provides a remedy and does not in itself create any substantive rights.[191] The Court specifically stated:

> The rights enforceable under § 1983 include those guaranteed by the Federal Government in the Fourteenth Amendment: that every person within the United States is entitled to equal protection of the laws and to those "fundamental principles of liberty and justice" that are contained in the Bill of Rights and "lie at the base of all our civil and political institutions."[192]

Finally, the Court concluded that uniform characterization of all section 1983 suits as involving claims for personal injuries minimized the risk that the choice of a state statute of limitations would not serve adequately the federal interests vindicated by the Act.[193] This eliminated the need for the Court to seek a better analogy to federal rather than state law.

2. Application of Personal Injury Limitations Periods in Title I Claims.—Title I claims are closely analogous to civil rights claims.[194] The purpose of LMRDA is to protect a union member's individual rights which have been violated by the union.[195] Similarly, the purpose of the Civil Rights Act is to provide a remedy to individuals whose constitutional rights have been harmed by the conduct of another.[196] Like the civil rights claim, Title I does not create rights to freedom of speech and assembly; rather, Title I ensures protection of these interests in the union context.[197] Moreover, Title I claims do not encompass the wide variety of fact situations giving rise to civil rights suits;[198] Title I

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[190] *DelCostello*, 462 U.S. at 171; *see also supra* notes 52-68 and accompanying text.

[191] *Wilson*, 471 U.S. at 278.

[192] *Id.* at 278.

[193] *Id.* at 279. The Court further stated:

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

Id.

[194] *See supra* notes 17-30 and accompanying text.

[195] *See supra* notes 17-30.

[196] *Wilson*, 471 U.S. at 277.

[197] *See supra* notes 17-30 and accompanying text.

[198] *See supra* note 126.

suits typically involve the denial of union membership or free speech and assembly, which are types of personal injury.[199] Thus, Title I violations are perhaps even more readily categorized as personal injury violations.

This characterization does not conflict with precedent in the labor field. Indeed, the Court in *Wilson* used the same method of analysis as the *DelCostello* Court. It reached a different conclusion because the nature of the claim was better served by a state statute of limitations rather than an analogous federal limitations period. The different interests involved in civil rights matters did not necessitate abandoning the traditional borrowing practice completely, from which the *DelCostello* Court cautioned against departing.[200]

Furthermore, labor policy also comports with the practice of characterizing a type of federal labor claim in a certain manner and uniformly applying to it a specific type of statute of limitations.[201] In *Auto Workers v. Hoosier Cardinal Corp.*,[202] the Supreme Court condoned the characterization of section 301 claims against an employer as sounding in contract.[203] The Court resisted the suggestion that it apply a uniform federal limitations period.[204] It held that Indiana's period for actions on unwritten contracts was appropriate.[205] The Court acknowledged that the subject matter of a 301 suit against the employer was suited to application of uniform law.[206] Nevertheless, it reasoned that national uniformity is of less importance when the suit does not involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it."[207] Thus limited uniformity was achieved while the court still adhered to analogous state law.

This limited uniformity among jurisdictions addresses the relevant concerns raised in *DelCostello* while still protecting the interests of the parties. It recognizes and alleviates the parties' uncertainties when filing suit, thus eliminating the problem of procedural disposal of meritorious claims. A general rule of uniform application of personal injury limitations periods would also guide lower courts in choosing the appropriate period.

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[199]*See supra* note 126.
[200]*DelCostello*, 462 U.S. at 171.
[201]Auto Worker v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).
[202]383 U.S. 696 (1966).
[203]*Id.* at 707.
[204]*Id.* at 706.
[205]*Id.* at 707.
[206]*Id.* at 702.
[207]*Id.*

Although the *Wilson* Court endorsed the choice of state statutes of limitations, it did not address how a court should respond when the particular state has no explicit statute for personal injury violations.[208] In this instance, a court should apply the limitations period used for personal injury actions. The practice of selecting the limitations period commonly used for personal injury suits when no express statute exists is important because it will dissuade a court from completely rejecting the rationale behind the Title I analogy to a personal injury action. Without instruction to select the limitations period applicable to personal injury claims, a court could revert back to the method of analysis used prior to *DelCostello* when no explicit statute is available in that jurisdiction.[209] By authorizing use of the limitations period commonly used for personal injury actions, however, a subsequent court is not as likely to abandon the personal injury analogy. This would preserve the limited uniformity created by the analogy. Where more than one personal injury statute of limitations exists, the court should choose the limitations period for actions most similar to the pending action. Although this alternative still has the possibility of creating some uncertainty for plaintiffs, the confusion is at least limited to fewer possible choices.

Aside from providing limited uniformity, the personal injury limitations period also ordinarily provides a longer period within which to file, thus addressing the practical problems facing the union member. This is an important consideration in the civil rights context as shown in the Supreme Court decision, *Burnett v. Grattan*.[210] *Burnett* supports the argument that a six-month period is inadequate when the Title I action is characterized as a civil rights type claim.[211]

In *Burnett*, a section 1983 action, the Supreme Court rejected as inappropriate the use of a six-month statute of limitations applicable to administrative procedures for resolution of employment discrimination complaints.[212] It noted the practical problems confronting a complainant and concluded that a six-month period only frustrated those difficulties.[213] The Court stated that the six-month period failed to "take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Act."[214]

Likewise, the Title I plaintiff confronts practical problems which are frustrated by a short limitations period. Since Title I claims are so

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[208] *Wilson*, 471 U.S. 261 (1985). Justice O'Connor addresses this problem in her dissent. *Id.* at 280-87.

[209] *See supra* text accompanying notes 31-51.

[210] 468 U.S. 42 (1984).

[211] *Id.*

[212] *Id.* at 50.

[213] *Id.*

[214] *Id.*

similar to civil rights claims, they too should not be dismissed summarily due to application of a short limitations period. Moreover, in the labor context, Title I claims do not implicate the collective bargaining process, which was a concern raised by *DelCostello*; therefore, a longer period within which to file a claim would not frustrate national labor policy.[215] Furthermore, a longer period would benefit the union member's rights without unfairly limiting the union's interests. The union member is given a longer period to assess his damages. The union is protected by a definite, predictable time limit.

V. Conclusion

The ideal solution to the question of which limitations period to apply to Title I claims is Congressional enactment expressly specifying the appropriate time limit. Because this is unlikely, or at least until this occurs, courts must determine the appropriate period by examining the interests involved and selecting the limitations period that is most similar. Thus far, courts have chosen a variety of periods, causing a split in authority.[216]

While some courts have adhered to the practice of borrowing analogous state statutes of limitations, others have abandoned this approach. In attempting to provide stability in the application of a limitations period, some courts have condoned a uniform selection of the six-month federal limitations period initially applied in *DelCostello*. This choice of periods is improper as a solution to the problem of discontinuity, because it does not adequately address and protect the vital interests of the union member in Title I cases. The diversity created by the different methods used by courts calls for an answer as to the correct characterization of Title I claims.

Title I claims closely resemble civil rights actions;[217] therefore, they should be governed by the same type of statute of limitations. However, the federal Civil Rights Act has not provided an explicit limitations period.[218] In *Wilson v. Garcia*,[219] the Supreme Court instructed lower courts to use state limitations periods for personal injury actions in civil rights matters brought under section 1983.[220] The *Wilson* decision provides guidance for courts wrestling with this problem in the LMRDA area also. Like civil rights actions, Title I suits should also be governed by

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[215]*See supra* notes 92-127 and accompanying text.

[216]*See generally supra* notes 69-81 and accompanying text.

[217]*See supra* notes 17-30.

[218]Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982).

[219]471 U.S. 261 (1985).

[220]*Id.* at 278.

personal injury state statutes of limitations.[221] In the absence of a specific state statute of limitations, the court should resort to selection of the limitations period commonly used in personal injury suits.

In the Title I context this selection would be appropriate because it would prevent courts from abandoning the *Wilson* guidelines. It would also preserve the policy considerations underlying the need for limited uniformity.[222] Moreover, this method of selection benefits both union members and unions because it fosters predictability in filing suits. Each party can foresee which limitations period the court is likely to apply to the pending action, thus enabling both plaintiff and defendant to proceed accordingly. A limitations period that promotes predictability and fairness in the length of time within which to file clearly furthers the aims of Congress in enacting Title I.

Use of the personal injury limitations period will not solve all the problems confronted by courts in Title I actions. It will, however, relieve courts from determining the appropriate limitations period on a case by case and issue by issue basis. In the absence of Congressional enactment or Supreme Court mandate, this choice appears preferable to the trend now evidenced by the lower courts in the wake of *DelCostello*.

ELLEN MARIE WHITE

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[221] *See supra* notes 194-215 and accompanying text.

[222] *See supra* notes 194-215 and accompanying text.

Book Review

Applications of Political Science to the Analysis and Practice of Law

David A. Funk*

Causation, Prediction, and Legal Analysis. By *Stuart S. Nagel.* New York, N.Y., Westport, Conn. & London, England: Quorum Books of Greenwood Press, Inc., 1986. Pp. xxii, 276. $39.95.

Law, Policy, and Optimizing Analysis. By *Stuart S. Nagel.* New York, N.Y., Westport, Conn. & London, England: Quorum Books of Greenwood Press, Inc., 1986. Pp. xix, 328. $45.00.

Microcomputers as Decision Aids in Law Practice. By *Stuart S. Nagel.* New York, N.Y., Westport, Conn. & London, England: Quorum Books of Greenwood Press, Inc., 1987. Pp. xxvi, 358. $45.00

I. The Man and His Work

Any academic or practicing lawyer still skeptical about the contributions which political science can make to the understanding of the legal process and the practice of law need only read three recent related works by Dr. Stuart S. Nagel.[1] Dr. Nagel received law and Ph.D. degrees from Northwestern University in 1958 and 1961 respectively,[2] and is one of the preeminent analysts of the legal process from a policy perspective in the twentieth century. Following his first major book in 1969,[3] he

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[1]S. Nagel, Causation, Prediction, and Legal Analysis (1986) [hereinafter cited as Causation]; S. Nagel, Law, Policy, and Optimizing Analysis (1986) [hereinafter cited as Optimizing] S. Nagel, Microcomputers as Decision Aids in Law Practice (1987) [hereinafter cited as Microcomputers]. These three works are not quite a trilogy, due to rather sketchy transitions between them (Causation ends rather abruptly), and reprinting of some chapters from Causation and Optimizing in Microcomputers. *See infra* note 26 and accompanying text. Nevertheless, they are closely related and proceed in an orderly fashion from one topic to another.

[2]Who's Who in American Law 568 (5th ed. 1987). The Ph.D. dissertation of Dr. Nagel dealt with "Judicial Characteristics and Judicial Decision-Making." Causation 97 n.10.

[3]S. Nagel, The Legal Process from a Behavioral Perspective (1969).

has published at least sixteen volumes as sole author,[4] nine jointly authored volumes,[5] and has edited four works,[6] in addition to many journal articles. His mother, "who inspired a desire to do well,"[7] and his supportive wife and collaborator[8] may be justly proud of his accomplishments.

Dr. Nagel is trying to get "social scientists to show more interest in applying their knowledge and skills to important policy problems" and encourage "policy-makers and policy-appliers to become more aware of the relevant knowledge and skills that social scientists have developed."[9] In the works being reviewed, this general goal often is advanced by application to specific problems. Dr. Nagel encourages others to listen, learn and follow him in this endeavor.[10] Dr. Nagel supplies a dazzling encyclopedic array of social science analyses which may be applied to the legal process.[11] His is not simply a literature survey with respect to

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[4]WHO'S WHO IN AMERICAN LAW, *supra* note 2, at 568-69.

[5]CAUSATION, *supra* note 1, at 266.

[6]*Id.* at 265-66.

[7]OPTIMIZING, *supra* note 1, at iv & xix.

[8]CAUSATION, *supra* note 1, at v & xxi-xxii; OPTIMIZING, *supra* note 1, at xix; and MICROCOMPUTERS, *supra* note 1, at xxvi.

[9]2 WHO'S WHO IN AMERICAN LAW 2033 (1986). This reviewer, in a much more modest way, has been engaged in a similar task. *See, e.g.*, Funk, *Pure Jurimetrics: The Measurement of Law in Decision-Regulations*, 34 U. PITT. L. REV. 375 (1973); D. FUNK, GROUP DYNAMIC LAW (1982); Funk, *Juridical Science Paradigms as Newer Rhetorics in 21st Century Jurisprudence*, 12 N. KY. L. REV. 419 (1985); and GROUP DYNAMIC LAW (D. Funk ed. forthcoming).

[10]CAUSATION, *supra* note 1, at 48 ("[w]hat is needed now are more people who are willing to do more of the hard but enjoyable thinking involved . . . ."); *id.* at 119 ("[w]hat may be needed is for more management science researchers to apply their skills to such legal policy problems and for more legal researchers to acquire more awareness of management science methods"); *id.* at 196 ("eventual application to a wide diversity of fields of law and its eventual application to building more realistic theories of the operations of the judicial process"). *See* OPTIMIZING, *supra* note 1, at xix ("inspire others to think in optimizing terms with regard to improving the legal process and legal decision-making"); *id.* at 14 ("[w]hat may be needed now are more people in either criminal justice or policy evaluation who are willing and able to apply policy evaluation analysis to criminal justice problems"). MICROCOMPUTERS, *supra* note 1, at v ("[t]o more systematic decision-making in law practice [w]ith the aid of microcomputers [f]or the benefit of clients, lawyers, and the general public"); *id.* at 4 ("enabl[ing] lawyers and other people who are not such great decision-makers to emulate the processes that good decision-makers implicitly use . . . ."); *id.* at 141 ("[w]hat is needed are some lawyer-entrepreneurs to implement the existing hardware and knowledge in order to make decision science more widely applicable to basic law practice . . . ."); *id.* at 234 ("inspire some experimentation along the lines suggested that could help law practices"); *id.* at 287 ("improve on the questions we ask"). *See generally* OPTIMIZING, *supra* note 1, at 307-08 (the relation of political science to legal policy studies).

[11]The CAUSATION subject index includes entries for: bivariate analysis, cross-lagged

these perspectives, though he cites prime examples from the relevant social science literature to enable any interested reader to pursue each type of analysis further.[12] Fainthearted readers need not be deterred by the variety of forms of analysis which Dr. Nagel brings to bear in his study of the legal process. He is a master of clear and simple explanation of each approach, and often illustrates them with well-chosen examples. The reader need only put himself or herself in the hands of the author and let him unfold his subject step by step.[13]

II. Three Related Works

Each volume under review develops a portion of the overall scheme. The first volume, *Causation, Prediction, and Legal Analysis*,[14] is an excellent systematic explanation of the logic, theory and methodology

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panel analysis, cross-sectional analysis, discriminant analysis, futures research, impact analysis, interrupted time series, judicial prediction, Markov chains, maximizing benefits minus costs, multiple correlation, multiple regression, optimum choice, policy/goal percentaging analysis (P/G%), predictive analysis, queuing, residual analysis, sensitivity analysis, staircase prediction, threshold analysis, and univariate analysis. Causation, *supra* note 1, at 273-76. *See also id.* at 107-12 (economic analysis); *id* at 54-59 (evaluation of social programs); *id.* at 85-106, 175-86 & 197-220 (judicial behavioralism); *id.* 189 (word [evaluative assertion or content] analysis). The Optimizing subject index includes entries for: benefit-cost analysis, decision-making, legal policy studies, optimizing analysis, policy evaluation, policy/goal percentaging (P/G%), queuing theory, simulation, spreadsheet analysis, threshold analysis, and "what-if" analysis. Optimizing, *supra* note 1, at 325-28. *See also id.* at 308 (economic analysis); *id.* at 9 (management science and operations research); *id.* at 17 (policy and program analysis). The Microcomputers subject index includes entries for: allocation analysis, constraints analysis, convergence analysis, decision-making, decision trees, judicial prediction, management science, multiple regression, optimizing, policy/goal percentaging (P/G%), residual analysis, risk analysis, sensitivity analysis, sequencing, staircase tables, and threshold analysis. Microcomputers, *supra* note 1, at 355-58. *See also id.* at 8 (critical path analysis); *id.* at 19 (multi-criteria decision-making); *id.* at 4, 51 & 219 (operations research); *id.* at 8 (queuing theory); *id.* at 19 & 214-15 (spreadsheet analysis); *id.* at 6 & 214-15 ("what-if" analysis). Causation, *supra* note 1, at 39-51 also deals with deductive modeling in policy analysis, which often is overlooked in works of this type.

[12]Each volume being reviewed contains an index of books cited, and a name index. More citations to economic analysis of law literature, where relevant to the discussion, might have been included, though this is a minuscule point.

[13]Causation sometimes includes summarizing charts to clarify terminology. *See, e.g.*, Causation, *supra* note 1, at 48-50. A less skillful author might need to add a glossary of technical terms, but Dr. Nagel explains so well that it is not necessary. Of the three volumes under review, however, Optimizing is best organized.

[14]This reviewer might have changed the title of Causation to "Causation and Prediction in Legal Analysis" due to his antipathy to conjunctive titles. Similarly Optimizing might have been "Optimizing Analysis in Policy and Law."

used in analysis of the legal process and sociology of law.[15] It is no substitute for a traditional statistics text, but uses statistical ideas well where appropriate, explains them clearly, and offers a wealth of pertinent examples illustrating each type of analysis discussed. In many respects it supplies the need, noted by Dr. Nagel, for a book dealing with causal explanation in the legal process.[16] Causation theory logically leads to theories of prediction. The jacket blurb explains these well:

> Within the legal arena, causal analysis explains the factors involved that cause legal policies/decisions to be adopted and the impact a legal policy is likely to have, and why. Predictive analysis is an attempt to forecast the outcome of a legal action and is especially useful for those involved in courtroom procedures.[17]

This first volume is very well organized, proceeding from causal analysis methods (both empirical-statistical and deductive-rational) and applications (especially judicial sentencing discretion, correlating judicial backgrounds with decisions, plea bargaining and jury size) to predictive analysis methods (both empirical-statistical and deductive-rational) and applications (especially predicting the outcome of court cases). Each methodological chapter is followed by practical applications so the reader can see how to use the techniques previously discussed, for practical purposes. At the same time, the author recognizes that not all propositions are susceptible of empirical analysis,[18] normative premises in particular cannot be validated empirically,[19] and traditional knowledge of the subject matter has an important role to play.[20]

The second volume, *Law, Policy, and Optimizing Analysis*, applies methods expounded in a previous work,[21] to practical decision-making in the legal process.[22] This volume deals with cost-benefit analysis and

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[15]This reviewer uses "sociology of law" in a narrow sense for studies of the impact of law on society, and "legal process" for studies of the impact of society on law and the internal workings of the legal process. Others use "sociology of law" more broadly to include both types of work.

[16]CAUSATION, *supra* note 1, at 22 n.1. H. HART & A. HONORÉ, CAUSATION IN THE LAW (1959), although not cited by Dr. Nagel in this discussion, is a "study of causal concepts in the law and their relation to those of ordinary thought . . . ." *Id.* at v. A second edition of this well known work was published in 1985. *See also* Schauer, *Thinking About Causation With Special Reference to Pornography*, L. QUADRANGLE NOTES 24 (No. 2 Winter 1987).

[17]CAUSATION, *supra* note 1.

[18]*Id.* at 57.

[19]*Id.* at 41.

[20]*Id.* at 230.

[21]S. NAGEL, POLICY EVALUATION (1982).

[22]OPTIMIZING, *supra* note 1, at xix.

finding an optimum level or mix, where doing either too little or too much is undesirable.[23] It will be of special interest to economists and political scientists interested in legal processes, as well as law practitioners especially in public law areas. It also is very well organized, with parts on general optimizing analysis, and optimum choice, risk, level, mix and timing. Illustrative applications include the right to counsel, plea bargaining, pretrial release, jury size, crime prevention, and reduction of litigation delay. A masterful introduction explains that five evaluation methods could be applied to five fields of criminal justice policy (crime reduction, police policy, courts policy, corrections policy, and allocation policy), though each field is used to illustrate only one of the five optimizing policy evaluation models.[24] Merely watching Dr. Nagel develop this structure, with its methods and applications is awe-inspiring. The brief conclusion on legal policy studies[25] seems less sure-footed than the rest, but nevertheless suggestive of further applications.

The final volume, *Microcomputers as Decision Aids in Law Practice*, will have greatest appeal to the practicing lawyer, especially managing partners of large law firms and legal departments of corporations and governments. Eventually practitioners in smaller work settings also will need to take these matters into account if they are to compete successfully with larger law offices. Several chapters of interest to practicing lawyers have been reprinted from the previous two volumes,[26] but at least two-thirds of this final volume seems to be new.

The title to this final volume describes its content.[27] Though microcomputers have become commonplace for word processing, file man-

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[23]*Id.* at 3-4.

[24]*Id.*

[25]*Id.* at 207-11. "Legal policy studies could more broadly refer to evaluating alternative policies that take the form of statutes, administrative regulations, court precedents, or quasi-judicial precedents on any subject. That comes close to covering all governmental policy since there are few policies that do not take those forms." *Id.* at 307.

[26]MICROCOMPUTERS, *supra* note 1, at xxvi. *Id.* at 15-19 seems to be a reprint of OPTIMIZING, *supra* note 1, at 39-42. MICROCOMPUTERS, *supra* note 1, at 55-115 seems to be a reprint of CAUSATION, *supra* note 1, at 197-259. MICROCOMPUTERS, *supra* note 1, at 121-30 seems to be a reprint of CAUSATION, *supra* note 1, at 187-96. MICROCOMPUTERS, *supra* note 1, at 143-67 seems to be a reprint of OPTIMIZING, *supra* note 1, at 91-115. MICROCOMPUTERS, *supra* note 1, at 259-70 bears some similarity to OPTIMIZING, *supra* note 1, at 155-81. MICROCOMPUTERS might well have included a table showing these relationships for the convenience of the purchaser of all three volumes.

[27]Apparently MICROCOMPUTERS was originally to bear the title, "*Using Personal Computers for Decision-Making in Law Practice*," used in MICROCOMPUTERS, at 318 & 345. This title discrepancy could have been corrected in final proofreading, but most of us probably are aghast to find that gremlins have had a hand in our final published work! MICROCOMPUTERS is a revised and expanded version of materials developed for a conference entitled "Using Personal Computer for Decision-Making in Law Practice" held May 10-11, 1985. MICROCOMPUTERS xxiii.

agement, information retrieval, accounting and similar office uses, this volume focuses on processing information to aid in predicting and making decisions.[28] Legal policy evaluation methods and illustrations were largely excluded, since they are directed more toward legal policy makers than practicing lawyers.[29] The result is a breathtaking analysis of the possibilities for using microcomputers in decision-making, principally with respect to judicial prediction, litigation choices, allocating law firm resources, and negotiation tactics.

In some respects these applications may seem futuristic, especially for the lawyer in a small work setting, but, as Dr. Nagel remarks, "[t]he future . . . is rapidly becoming the present in this growing field of microcomputers as decision-making aids in law practice."[30] Dr. Nagel has been waiting patiently for twenty-five years for this subject to develop,[31] and may not have to wait much longer. Certainly the rise of microcomputer information processing over that period makes microcomputer applications to lawyer decision-making more feasible.

Anyone interested only in this portion of the works under review will find this final volume invaluable. Though it aptly extends the theories and applications of the first two volumes to even more applications of special interest to the practicing lawyer, it need not be read in that way; summarizing, reprinted[32] and explanatory material enable it to be read alone by those particularly interested in these practical applications of the more general theories explicated in the two previous volumes under review.

Dr. Nagel includes in two places an excellent critique of his "predecessor,"—the Jury Verdict Research Company[33]—in the application of these theories and a rather passionate appeal for expanding this approach into a judicial prediction service.[34] This reviewer is less sanguine concerning the economic feasibility of this project at this time. The reviewer also questions the utility of finding words that are disproportionately present in opinions where for example, plaintiffs have won,[35] and whether knowledge by lawyers practicing in fifty courthouses across the United States that their activities are being used for regional and national generalizations will affect their future behavior.[36] Nevertheless, amazing

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[28]MICROCOMPUTERS, *supra* note 1.

[29]*Id.*

[30]*Id.* at xxv.

[31]*Id.*

[32]*See supra* note 26.

[33]CAUSATION, *supra* note 1, at 192-96. MICROCOMPUTERS, *supra* note 1, at 126-30.

[34]CAUSATION, *supra* note 1, at 187-92. MICROCOMPUTERS, *supra* note 1, at 121-26.

[35]CAUSATION, *supra* note 1, at 189. MICROCOMPUTERS, *supra* note 1, at 123.

[36]*See, e.g.*, the classic experiment at the Hawthorne Works of the Western Electric

things have been accomplished by people who have ignored the fears of earthbound naysayers. If anyone can create judicial prediction and lawyer decision-making services at this time, surely Dr. Nagel is a prime candidate.[37]

III. Minor Criticisms

Even though the publisher is to be applauded for undertaking this large and important project, some minor criticisms remain. Though the text and many tables are set in type and quite legible, many of the tables are not set in type[38] and some of them are not as legible as they might have been for easy reading.[39] Similarly, subject index entries only provide the page number where the discussion of the subject begins, even though it may extend over several pages or an entire chapter. It would have been helpful to one using these works for reference to be able to ascertain from the index, the number of pages devoted to each subject indexed.

Examples chosen seem to emphasize public law more than private law.[40] Though each type of example adequately illustrates the method being applied, additional private law examples probably would be of greater interest to many practicing attorneys. Similarly, the data used to illustrate a method occasionally seem a little old.[41]

Dr. Nagel seems to overemphasize the business aspects of law practice,[42] though his applications of management science are most applicable to that type of activity. Also, he is very careful to point out that his analyses are to be used only within ethical constraints.[43]

Ironically, this reviewer is more skeptical than Dr. Nagel about the ability to isolate and assign meaningful quantities to various aspects of

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Company in which selection as the subject of an experiment apparently affected the behavior of the participants. F. Roethlisberger, Management and Morale (1941). Could an insurance company fail to anticipate the larger effect of a liberal settlement in one of these bellwether venues, for example?

[37]*See generally* Microcomputers, *supra* note 1, at 141, 142 n.7 & 208-09.

[38]*See, e.g.*, Causation, *supra* note 1, at 68-69, 81-82, 167-68 & 221-22; Optimizing, *supra* note 1, at 5, 43-46, 141 & 143; Microcomputers, *supra* note 1, at 16, 22-29, 35, 37-38 & 235.

[39]*See, e.g.*, Causation, *supra* note 1, at 89, 176 & 183; Optimizing, *supra* note 1, at 151; Microcomputers, *supra* note 1, at 116-17, 136, 171, 211-12, 266 & 322.

[40]*See, e.g.*, Causation, *supra* note 1, at 229; Optimizing, *supra* note 1, at xvii-xviii; and Microcomputers, *supra* note 1, at 7 & 217.

[41]*See, e.g.*, Causation, *supra* note 1, at 175 (civil liberties cases from 1956 through 1960). Similarly, the bibliography in *id.* at 191-92 could have been updated.

[42]*See, e.g.*, Microcomputers, *supra* note 1, at 219-39 & 314.

[43]*See, e.g.*, *id.* at 241.

the legal system,[44] while more sanguine on the feasibility of impact studies, even though the criticisms of Dr. Nagel are well taken and his suggestions well worth taking into account.[45] A few remaining criticisms, unworthy of full size type, appear below.[46]

IV. Conclusion

Of what importance are a few minor criticisms by one reviewer of the work of a scholar like Dr. Nagel in these three related works? He can scarcely be expected to satisfy every reader with respect to every detail of his enterprise. No one who has seen Devil's Tower rising 865 feet from the plains of Wyoming can forget its grandeur. The work of Dr. Nagel, rising from the plains of Champaign, Illinois, is like that. But, having built this pinnacle, Dr. Nagel is trying to help us climb it, so that we, too, may profit from his view of the surrounding plain. For that, we shall be forever in his debt.

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[44]*See, e.g.*, Causation, *supra* note 1, at 198 (characteristics associated with winning or losing cases); *id.* at 229-30 (listing tentative criteria to aid in explaining why cases were decided one way or another, and the relative importance of each criterion). *See also* Microcomputers, *supra* note 1, at 6 (which goal is least important and how many more times as important each other goal is); *id.* at 27 (the relative weight of the first goal relative to the other goals); *id.* at 178 (how many more times each other criterion is more important than the base criterion); *id.* at 314 (scores of the alternatives on the goals, scores of the cases on the criteria and predicted scores of the cases on those criteria).

[45]*See generally* Causation, *supra* note 1, at 53-59.

[46]Causation, *supra* note 1, at 187 & 237 refers to "random" issues and procedures; are they really randomized, and if so, why? Should Louis Guttman be mentioned somewhere in connection with "staircase tables" in Causation, *supra* note 1, at 197-227? *See, e.g.*, Schubert, *Social Psychology and Judicial Attitudes*, Judicial Behavior: A Reader in Theory and Research 306, 308 (G. Schubert ed. 1964) (noting linear cumulative scaling was initially developed by Louis Guttman and his associates). Causation, *supra* note 1, at 243 seems to attach little importance to the rules of international law as predictors of the outcomes of international law cases, and the cases contained in four leading (American?) international law casebooks may not be a very good sample. This reviewer doubts whether economic analysis of law has pushed sociology, psychology and political science out of the study of law, as much as Dr. Nagel supposes in Optimizing, *supra* note 1, at 308. Similarly, in the opinion of this reviewer, the "old law and society movement" has not moved so far toward abstract theoretical concerns and away from legal policy problems as Dr. Nagel supposes. *Id.* at 309.

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3. FREQUENCY OF ISSUE: Quarterly	3A. NO. OF ISSUES PUBLISHED ANNUALLY: Four	3B. ANNUAL SUBSCRIPTION PRICE: $22.00

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